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No. 84-

IN THE

Supreme Court of the United States

OCTOBER TERM, 1984

FORRO PRECISION, INC.,
Petitioner,

VS.

INTERNATIONAL BUSINESS MACHINES CORPORATION,
Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

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QUESTIONS PRESENTED

This case is concerned with IBM's use of a private "sting" operation—code named "Operation Artichoke"—to create a "thunderclap" of publicity, the intended and actual effect of which was to severely disrupt and interfere with Forro's contractual relations. The jury found that IBM had in fact unlawfully interfered with Forro's business relationships. It returned a verdict in favor of Forro on Forro's intentional interference claim, and awarded compensatory damages. On appeal by IBM the court of appeals reversed and remanded for a new trial. On remand the trial court granted summary judgment in favor of IBM. Forro appealed, and the court of appeals affirmed the judgment of the trial court. The questions presented for review are:

(1) Is IBM's seizure of Forro's confidential business records immune from civil liability as a matter of law when it is established that IBM acted together with the police to fabricate and to submit a false affidavit to a Judge in order to obtain the Forro search warrant; where the warrant was invalid and unconstitutionally overbroad in its description of the things to be seized; and where there is substantial evidence that the police and IBM acted with malice in searching Forro's plant and seizing Forro's business records?

(2) May a panel of a court of appeals, consistent with the law of the case doctrine, and the constitutional right of trial by jury, ignore and vacate a jury award of damages when, as here, a different panel of the same court has previously found that the jury award was properly and sufficiently supported by the trial record?

(3) May a court of appeals, consistent with this Court's decision in *Erie v. Thompkins,* 304 U.S. 64 (1938), simply ignore controlling state law which requires that in considering the propriety of a search and seizure the court of appeals itself measure the facts, as found by the jury, against the constitutional standard of reasonableness?

(4) May a court of appeals, consistent with the constitutional right of trial by jury, and this Court's decision in *Erie v. Thompkins,* simply ignore controlling state court law

which requires that, unless the facts permit but one conclusion, the question of whether a privileged occasion was abused be determined by the jury?

PARTIES IN THE COURT OF APPEALS

The parties to the proceeding in the court below are those named in the caption of the case in this court. Forro has no parent, subsidiary or affiliated companies or corporations.

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I

OPINIONS BELOW

The initial opinion of the court of appeals below is reported at 673 F.2d 1045 and is reprinted as Appendix A. The order of the district court granting summary judgment and the judgment entered thereon are reprinted as Appendix B. The opinion of the court of appeals below affirming summary judgment is reported at 745 F.2d 1283 and is reprinted as Appendix C.

II

GROUNDS ON WHICH THE JURISDICTION OF THIS COURT IS INVOKED

The decision of the court of appeals was entered on October 26, 1984. A timely filed suggestion for rehearing en banc was denied by order entered on January 4, 1985. The jurisdiction of this Court is invoked pursuant to 28 U.S.C. § 1254(1) and Rule 20.4 of the Rules of the Supreme Court of the United States.

III

BASIS FOR FEDERAL JURISDICTION IN THE DISTRICT COURT

Jurisdiction in the district court is based upon diversity of citizenship, 28 U.S.C. § 1332, and upon 15 U.S.C. § 15.

IV

THE CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The following Constitutional and statutory provisions involved in the instant petition are reprinted in Appendix D in accordance with Rule 21.1(f): the Fourth and Seventh Amendments to the Constitution of the United States; Article I, Sections 13 and 16 of the Constitution of the State of California; California Civil Code, Sections 43.5(a) and 47(2); California Penal Code, Sections 830.6(b) and 1530; and, California Code of Civil Procedure, Section 262.1.

V

STATEMENT OF THE CASE

A. The Procedural Facts

1. Initial Proceedings In The Trial Court

Forro's first amended complaint consists of six common law counts and a federal antitrust count based on violations of Sections 1 and 2 of The Sherman Act, 15 U.S.C. §§ 1, 2. Five of the common law counts, and Forro's entire antitrust claim, have been forever put to rest.[1] Thus, the procedural facts set out below

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[1] On August 11, 1977, the trial court granted summary judgment on five of Forro's common law claims. The court found four of the claims barred by the applicable California statutes of limitations, and found one claim to be substantively deficient (RT 120-122). No appeal was taken. Forro's claim under Section 1 of the Sherman Act was withdrawn at trial (RT 2686). The jury deadlocked on Forro's Section 2 attempt to monopolize and monopolization claims, and the trial court entered

are limited to Forro's claim for intentional interference with contractual relations (Count VII), alleged as follows in the first amended complaint:

> 59. Defendant maliciously and with the intent of disrupting plaintiff's economic relationships and in an effort to ruin the business of plaintiff, intentionally and without justification did on June 29, 1973, acting together with others, seize plaintiff's business records including confidential pricing information and blueprints.
>
> 60. IBM's unlawful acts as alleged above had the completely foreseeable and proximate result of disrupting Forro's valuable economic relationships alleged above.
>
> 61. Forro had no knowledge of the unlawfulness of the acts hereinabove alleged, or of any facts which might reasonably have led to the discovery thereof until discovery under the complaint originally filed by Forro herein. Forro could not have discovered the unlawful acts at an earlier date by the exercise of due diligence because of the secretive and deceptive techniques employed by IBM to avoid detection under the color of the power of the courts."
>
> 62. As a direct, proximate and foreseeable result of the violation of the common law herein alleged, plaintiff has suffered substantial injury to its business, property and reputation in an amount believed to be not less than One Hundred Thousand Dollars ($100,000) and general damages.
>
> 63. Defendant did those acts herein alleged intentionally and with malice, and exemplary damages in an amount not

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judgment on those claims in favor of IBM (Hearing, 10/26/77, TR., p. 61). Forro appealed, and the court of appeals affirmed, 673 F.2d 1045, 1058-1062 (9th Cir.) 1982.

> less than Fourteen Million Dollars ($14,000,000.00) should be awarded Forro." (CR, ¶¶ 59-63).[2]

In answer to the first amended complaint IBM admitted that police authorities had seized certain documents found on Forro's premises. IBM denied the remaining material allegations of Forro's claim, and, by way of affirmative defense, alleged that the seizure of Forro's documents had taken place pursuant to a valid search warrant, and that IBM's acts were justified and privileged (CR. 115, ¶¶ 58-61, 77).

On July 25, 1977, IBM moved for summary judgment on Forro's intentional interference claim, asserting that its conduct was justified and privileged as a matter of law, and contending that the claim was barred by the statute of limitations (CR 151; RT 21-23). Forro opposed IBM's motion, pointing to substantial evidence which demonstrated that the Forro search warrant was invalid and "a fake"; that in obtaining the Forro warrant, IBM had conspired with police officials to defraud a judge; and that IBM had, in violation of court order, contacted Forro customers and accused Forro of illegal conduct (RT 26-103). With respect to IBM's conspiracy with police officials,[3] Forro pointed out that such conduct could not be held justified or privileged as a matter of law:

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[2] Although focused upon the unlawful seizure of business records, Forro's intentional interference claim specifically referred to and incorporated various other allegations of the first amended complaint, including an allegation that IBM had unlawfully purchased the investigative resources of the San Jose police department, and had fraudulently obscured the unlawful relationship between itself and Santa Clara County police and prosecutorial officials. (CR 87, ¶¶ 22,57)

[3] On May 4, 1977, Forro filed its Statement of Issues to be Tried and specified "an unlawful combination" between IBM and the Santa Clara County police and prosecutorial authorities (CR 110, pp. 4-6). On August 15, 1977, Forro filed its Memorandum re Certain Trial Issues, and provided the court with a statement of authorities in connection with Forro's claim that IBM had "unlawfully subverted and combined with certain governmental authorities for the purpose of injuring Forro in its business. (CR 183, p. 1)

> "[I]t is our position that as a matter of law, if a defendant for the purpose, with predatory intent and for the purpose of interfering with someone's business or for the purpose of destroying someone or eliminating them, if he conspires with an official, makes a misrepresentation to an official or the Court, engages in conduct like fraud against the official, or bribery, or as the Ninth Circuit said in this Coca-Cola Bottling case, intimidation or coercion, that these are clearly not protected." (TR 88)

IBM's motion was denied, the trial court concluding:

> "(The Court) Partially, I would think that perhaps some misrepresentations to a body might not be enough, but if you tie misrepresentations with undue pressures, and a whole series of wrongdoing, it might very well create a situation which would take you outside the immunizations intended by the Supreme Court and other courts, in my view . . . On evidentiary questions, you (IBM) may set up an early objection, and have a continuing objection to testimony along those lines, but I am going to let that testimony as to the conduct with the police officers and the other bodies in." (RT 103, 103-A).

On August 15, 1977, jury trial commenced. As part of its case in chief, and on the issues of conspiracy to interfere and malice, Forro called the police and prosecutorial officials who participated with IBM in obtaining the Forro search warrant and in seizing Forro's confidential business records. Among other things, Forro demonstrated that the San Jose Police authorities had, with the active assistance and cooperation of IBM, obtained a warrant for search of Forro's plant based upon a fraudulent affidavit (PX 66, PX 425). Additionally, Forro demonstrated that the Forro search warrant, executed jointly by IBM and police officials, was so wholly nonspecific as to permit seizure of "every single document" found at Forro (PX 425, pp. 1-2; CR 189, 112-119; RT 978-980). For its part, IBM offered police reports[4] and other

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[4] DX 5186, DX 5815, DX 7372, DX 5816, DX 6312, DX 6912, DX 6315, DX 6316, DX 6319. IBM explained "what we have, your Honor, in this case, the evidence has continually gone to just what [did] the

evidence "to show the state of mind of the police." (RT 682, 692-693, 725, 741, 1827).

At the close of Forro's case IBM moved for a directed verdict on the intentional interference claim. IBM asserted that there was no evidence of a conspiracy between itself and police officials; argued that its conduct was privileged, immune or justified as a matter of law;[5] and, contended that Forro had failed to show injury. IBM's motion was denied (RT 1839). At the close of trial IBM again moved for a directed verdict. IBM's motion was made on the ground that Forro's claim was "defeated as a matter of law in light of the various privileges applicable to IBM's conduct," and on the ground that Forro had "failed to prove the fact of damage." (RT 2699-2700-2712) After extensive argument, the trial court denied the motion. (RT 2713)

On September 13, 1977, the case was given to the jury. In connection with Forro's intentional interference claim the jury was instructed that it could not return a verdict in favor of Forro if it found that IBM's conduct and communications were motivated by IBM's desire to protect its trade secrets or proprietary information or to aid in the proper enforcement of the criminal laws. The jury was further instructed that there was a strong public policy to encourage all citizens to assist law enforcement agencies by reporting criminal activities, and by cooperating with the duly authorized civil authorities in carrying out the law enforcement duties assigned to such authorities (RT 2924-2925). On September 16, 1977, the jury returned its verdict in favor of Forro on Forro's intentional interference claim. It awarded compensatory damages in the amount of $2,739,010.00. (CR 238).

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police know? What did the District Attorney know? What didn't they know?" (RT 725)

[5] IBM asserted that the evidence demonstrated the existence of probable cause for the Forro search; the validity of the search warrant and the immunity of the police; and thus the extension of police immunity to IBM. [*See* e.g. RT pp. 679-683, 692-693, 695-697, 701, 703, 709, 720-722, 724-726; *and see: People v. Turner,* 249 Cal.App.2d 909, 926 (1967)].

On October 26, 1977, the trial court denied IBM's motion for judgment n.o.v. or for a new trial. The court determined that there was substantial evidence supporting Forro's intentional interference claim; found a conflict in the record as to the knowledge and state of mind of IBM and the police authorities; and held the jury's damage award to be properly supported (Hearing 10/26/77, RT 17-25, CR 247). IBM appealed.

2. The First Appeal—Forro I

On appeal IBM conceded the *prima facie* sufficiency of Forro's intentional interference case, but contended that the entirety of its conduct was privileged by California law, and asserted that Forro had not introduced sufficient evidence upon which the jury could base damages (IBM Reply and Rebuttal Brief, p. 3, ftnt. 3; IBM App. Brief, 20, 21). Forro urged that the damages found by the jury had a substantial basis in the record, and, on the questions of privilege and immunity, pointed to the overwhelming evidence of a conspiracy between IBM and police officials to intentionally and maliciously interfere with Forro's business relations (Forro App. Brief, pp. 18-36). Forro demonstrated that, under controlling decisions of the California Supreme Court and California courts of appeal, it was plainly unlawful and unjustifiable for IBM to combine with law enforcement officials to conduct a search and seizure for the purpose of intentionally interfering with Forro's business relations, and, in that connection, attacked the Forro search warrant as impermissably overbroad. (Forro App. Brief, pp 64-67).

In April, 1982, after lengthy deliberation, the court of appeals reversed and remanded for a new trial. (Appendix A, p. 16). In doing so, the court found that the jury's damage award was properly supported by the evidence, and directed that damages need not be retried. (*id* at pp. 7-9).

With respect to the search and seizure, the court of appeals held that IBM's participation in the Forro seizure was immune (Appendix A, pp. 10-13). In doing so, the court erred fundamentally, and failed to address or determine the sufficiency of the

evidence supporting Forro's allegation that IBM had acted together and conspired with police officials[6] to intentionally and maliciously interfere with Forro's contractual relationships.[7] Nor did the court address the law controlling this point. The court committed further serious procedural error in assuming[8] the validity of the Forro search and by refusing to itself measure the facts, as found by the jury, against the constitutional standard of reasonableness.[9] Substantively, the court erred in its *sub silentio*

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[6] The court of appeals re-formulated Forro's theory so as to eliminate reference to an IBM-police conspiracy:

> "Forro's theory is two-fold: first, that IBM orchestrated and participated in a police investigation of Forro in order to subject the company to a "thunderclap" of adverse publicity and thereby disrupt Forro's business relationships, and second, that IBM used deceitful means to persuade the police to cause the issuance of the search warrant for Forro's plant and then participated in the ensuing search and seizure of Forro's business records." (Appendix A, p. 6).

[7] In addition to ignoring the question of conspiracy, the court of appeals viewed the search and seizure facts and inferences in a light which was decidedly most favorable to IBM, a procedure which clearly violates established rules of federal and state appellate practice, *Lavender v. Kurn,* 327 U.S. 645 (1946); *Nestle v. City of Santa Monica,* 6 C.3d 920 (1972); *see* Witkin, Cal. Proc., 2d ed., Vol. 6, Part I, §§ 245-249, 254.

[8] The Forro search warrant and the affidavit in support of search warrant were admitted into evidence and considered by the jury together with other documents and oral testimony pertinent to the Forro search and seizure. As stated by the court in *People v. Govea,* 235 C.A. 2d 285 (1965), "it is the function of the trier of the facts, not that of a reviewing court, to appraise and weigh the evidence (pertinent to the validity of a search warrant)." *id* 297.

[9] *People v. Superior Court,* 77 C.A.3d 69 (1978); *People v. Rodriguez,* 71 C.A.3d 547 (1977); *People v. Podesto,* 62 C.A.3d 708 (1976).

approval of a search warrant which was outrageously and unconstitutionally overbroad,[10] and which, on the uncontroverted record, left the identity of the things to be seized to the unfettered discretion of the police and IBM acting at the search scene.

On the question of IBM's communications to the police authorities, the court of appeals continued to ignore Forro's conspiracy theory; viewed the evidence and the inferences in the light most favorable to IBM; substituted its own findings of fact in place of findings made by the jury; refused to adhere to controlling California law specifying that "the question of whether a privileged occasion was abused is for the determination of the jury";[11] and held that IBM's communications with the authorities were privileged as a matter of law. (Appendix A, pp.13-16).

Forro filed a timely petition for rehearing, pointing out that the panel had overlooked points of fact and law central to Forro's intentional interference claim, including substantial evidence that: (1) IBM had conspired with police and prosecutorial officials to unlawfully execute an invalid search warrant; (2) IBM had conspired with police and prosecutorial officials to make intentional misrepresentations of fact to a judicial officer; (3) IBM had bribed and corrupted police and prosecutorial officials; and (4) IBM had conspired with police and prosecutorial officials to intentionally violate court orders. Among other things, Forro pointed out that, contrary to the unsupported and unsupportable assumption made by the court of appeals, the evidence was that the Forro search warrant was clearly invalid because it failed to comply with the particularity requirements of Article I, section 13 of the California Constitution. (*Petition for Rehearing,* filed 5/10/82). Forro's petition was denied without comment or explanation on July 7, 1982.

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[10] *Burrows v. Superior Court,* 13 C.3d 238 (1974); *Thompson v. Superior Court,* 70 Cal.App.3d 101 (1977); *People v. Superior Court,* (Williams) 77 Cal.App.3d 69 (1978).

[11] *Frisk v. Merrihew,* 42 Cal.App.3d 319 (1974).

3. Post-Remand Proceedings In The Trial Court

As noted, the court of appeals remanded for a new trial with instructions that there be no new trial on damages. But no new trial occurred. Instead, the trial court granted summary judgment in favor of IBM. The trial court viewed the determinations made by the court of appeals on the questions of privilege and immunity as binding upon it, and did not address or consider the evidence pertinent to a conspiracy between IBM and police authorities.[12] Rather, dismissal was based on rejection of the holding of the court of appeals on the damage issue, and the trial court's conclusion that there was no sufficient evidentiary basis for the damages awarded by the jury. The trial court considered the exact same record as had been considered by the court of appeals and found that there was no material issue of fact:

> (a) That Forro's damage claim consists entirely of an evidentiary showing that Forro suffered damage as a result of the occcurrence of a 1973 police search of Forro's premises and IBM's participation in that search. In responding to IBM's Motion for Summary Judgment, Forro has made no claim or showing of any other damage;
>
> (b) That apart from the evidence of IBM's communications with law enforcement authorities and IBM's participation in the police search, there is no evidence of IBM conduct which as a matter of law is sufficient to constitute proximate cause for the occurrence of the 1973 police search of Forro's premises. In responding to IBM's Motion for Summary Judgment, Forro has made no showing of any IBM conduct beyond that presented in the prior trial record." (CR 340; Appendix B).

The trial court' s findings on the issue of damages were not only disputed by substantial evidence, they flatly contradicted the law

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[12] "[The Court] Under the holding of the Ninth Circuit in this case, IBM's communications with law enforcement authorities and IBM's participation in the 1973 police search are privileged as a matter of law and cannot serve as a basis for imposing liability on IBM." (*Order,* 7/7/83; CR 340)

of the case[13] as established by the court of appeals in Forro I. Forro appealed.

4. The Second Appeal—Forro II

On the second appeal, Forro urged the law of the case on the issue of damages; pointed to substantial evidence showing that IBM's conduct—and specifically its "thunderclap" plan—went well beyond involvement with public authorities and was not privileged;[14] and demonstrated that, assuming privilege. Forro was, under controlling California law, entitled to have a jury decide whether IBM had abused a privileged occasion (Forro App. Brief, pp.17-21).[15]

On October 26, 1984, the court of appeals rendered its opinion and affirmed summary judgment in favor of IBM (Appendix C). The court of appeals refused to consider, and entirely ignored, the law of the case on damages as established on the first appeal.[16] Instead, the court found that "all of Forro's injury arose directly from the police search,[17] for which we have held IBM protected by the Civil Code § 47(2) privilege." (*id* at p. 33, ftnt. 2).

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[13] *see: Moore v. Jas. H. Matthews & Co.*, 682 F.2d 830, 833-834 (9th Cir.) 1982.

[14] *Gruenberg v. Aetna Insurance Company*, 9 C.3d 566 (1973)

[15] *Frisk v. Merrihew*, 42 Cal.App.3d 319 (1974).

[16] The second appeal was heard by a panel other than that which had decided Forro I.

[17] The court of appeals stated that "IBM deliberately withheld from the Santa Clara Police information which, if revealed, might have dissuaded them from searching Forro's premises," (*id* at p. 33). The actual evidence on this point, submitted to the jury in connection with Forro's theory that IBM had *conspired* with police and prosecutorial authorities, was that the *police authorities* acted with IBM to create and submit a false affidavit to a *judge* in order to obtain the Forro search warrant (PX 66; PX 425 pp. 33-34; RT 667-671, 678-679; RT 435-439; RT 479-495).

Contrary to what had been said by the court of appeals in Forro I.[18] and contrary to that panel's finding that evidence of "post-search publicity" was "sufficient evidence from which the jury could have inferred the existence of an injury," the panel in Forro II found that Forro's contention that it had been injured by IBM's thunderclap of post-search publicity "was never made to the district court." (Appendix C, p. 34).[19]

Likewise, the court of appeals refused to at all address or consider the question of whether Forro was, under controlling California law, entitled to have the jury[20] determine whether in fact IBM had abused a privileged occasion. Instead, the panel cited a decision of a California court of appeals[21] for the proposition that it was "California's manifest policy (to) resolve doubts in favor of extending (the) privilege (afforded by California Civil Code § 49[2])" (*id* at p. 34). Forro's petition for rehearing and suggestion for rehearing en banc was denied on January 4, 1985.

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[18] "Forro's theory is two-fold: First, that IBM orchestrated and participated in a police investigation of Forro in order to subject the company to a "thunderclap" of adverse publicity and thereby disrupt Forro's business relationships . . ." (Appendix A. p. 6).

[19] Having thus discounted a major element of Forro's case, the panel was moved to consider a single item of what it characterized as "IBM-generated publicity," and a single post-search contact between IBM and a Forro customer. It rejected both on its finding that "there is no causal link between these events and injury to Forro" (Appendix C, p. 35).

[20] The court of appeals flatly ignored the California appellate court's decision in *Frisk v. Merrihew, supra,* and opined that Forro's reliance upon the decision of the California Supreme Court in *Gruenberg, supra,* was "misplaced" (Appendix C, p. 33, ftnt 2).

[21] *Twyford v. Twyford,* 63 C.A.3d 916 (1976)—a pleading case having nothing to do with a police conspiracy or with search and seizure.

B. The Liability Facts

1. IBM Plants the Merlin Time Bomb

In December 1971, IBM deposed[22] two of Forro's officers and obtained numerous Forro blueprints and specifications for computer components then being manufactured and sold by Forro to IBM's major competitors. Forro's blueprints and specifications were obtained on the basis of misrepresentations made by IBM.[23] IBM secretly copied the Forro blueprints and specifications and, at that time, determined in its own mind that the drawings contained information respecting IBM's "Merlin" computer product. A week later, IBM returned[24] the blueprints and drawings to Forro without making any claim that the documents contained IBM trade secrets or that Forro had unlawfully acquired the documents. Neither did IBM suggest that Forro should be or was in any way restricted in its continued possession or use of the so-called "Merlin" drawings.[25]

2. The Department of Justice Determines IBM's "Trade Thefts" Are Old Hat

In June, 1972, and again in November 1972, IBM met with top officials of the United States Department of Justice and falsely

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[22] The transcripts of the Forro depositions were sealed by court order; were not to be disclosed to anyone other than IBM and Memorex Corporation; and were not to be used for any purpose other than the civil litigation then pending between IBM and Memorex (PX 432, PX 433).

[23] RT 1376-1381, 1387-1388; PX 66, PX 303, PX 337, PX 663; CR 210, RT 1459-1467, 1470-1487; DX 6731-6763.

[24] PX 66. Contrary to the statement of fact made by the panel in Forro I (Appendix A, p.4), there is *no evidence whatsoever* that the "Merlin" documents were returned to Forro because of a preexisting stipulation or agreement.

[25] In June and July, 1972, the Santa Clara County District Attorney's Office and the San Jose Police Department conducted a formal investigation into the alleged theft of IBM's "Merlin." After requesting and receiving all pertinent information known to IBM, the investigation closed without any action on the part of the public authorities. No search warrants were issued or applied for. (PX 372, PX 373).

accused Forro of being a thief and as being unlawfully possessed of documents pertinent to IBM's "Merlin" and "Winchester" computer products. (RT 791-807; PX 92, PX 93, PX 124, PX 332, p.2, PX 370, PX 371). IBM's contacts with the Department of Justice were made in direct violation of the protective order entered by the court in *IBM v. Memorex*, and were made at a time when IBM knew[26] that Forro had no information or documents pertinent to IBM's "Winchester."

The Justice Department declined investigation concerning any of the matters alleged by IBM on its finding that IBM's allegations concerned an "old situation that had been (previously) investigated," and because it was against the policy of the Department of Justice "to initiate action looking toward prosecution in those trade secret cases where the information had been made public." (PX 437; RT 802-807)

3. IBM's Initial Interferences with Forro Customers

On August 8, 1972, IBM developed a confidential plan to institute private investigations and/or civil actions against small computer component manufacturers in an effort to create "industry-wide publicity" adverse to the component manufacturers' business interest. While IBM planned to sue the small manufacturers for money damages, it, at the same time, stated that its "goal" was "not the recovery of monetary damages," but to create "pressure" (RT 859-874; PX 99).[27]

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[26] In late June, 1972, and July, 1972, IBM secretly enlisted an industrial spy—one Alonzo Wilson—to infiltrate Forro's manufacturing facility in an effort to discover and transmit to IBM highly confidential information respecting Forro's "production capability" and the "types of products being manufactured" by Forro, and to obtain Forro blueprints and specifications for computer components made by Forro and sold to IBM's major competitors. Wilson specifically reported to IBM that Forro did not have any "Winchester" documents or information (RT 757-771, 785, 835-858; PX 124, p. 5). At trial, IBM itself characterized this illegal adventure as a "subterfuge" (RT 846).

[27] In this case IBM sued Forro for 25 million dollars—an amount more than five times Forro's net worth [CR 115, pp. 29-30].

During the period September, 1972—January 1973, IBM secretly contacted and met with customers of Forro, including Honeywell, 3M and CDC, and falsely accused Forro of being unlawfully possessed of "trade secrets" pertinent to IBM's "Merlin." IBM's contacts with Forro's customers were made in direct violation of the IBM v. Memorex protective order and involved IBM's unauthorized disclosure of the Forro blueprints which IBM had obtained from Forro on false pretenses in December, 1971 (RT 984-1078; PX 104, PX 114, PX 128, PX 143, PX 338, PX 346). During the course of these contacts, IBM obtained the secret cooperation of Honeywell and 3M[28] in IBM's private investigation and plan to create industry-wide publicity adverse to small computer component manufacturers. In exchange, IBM agreed to provide Honeywell and 3M with criminal "immunity" and a full release of all liability respecting their possession and use of IBM's "Merlin" documents.[29]

4. Operation Artichoke

In late January 1973, after it had secured the secret cooperation of Honeywell, 3M and CDC, and as part of its plan to create a "thunderclap" of publicity adverse to small companies manufacturing computer components, IBM instituted what it colorfully styled as "Operation Artichoke" (RT 916-924; PX 140, PX 346). Operation Artichoke was IBM's confidential plan to employ an east coast thief as a "plant" (Artichoke) so that IBM might

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[28] Honeywell and 3M agreed to hold IBM's contact regarding Forro secret, and IBM agreed to "protect" Honeywell and 3M, and to not approach police authorities absent "concurrence" by Honeywell and 3M and CDC, ftnt. 29 infra.

[29] RT 916-924, 1048-1051, 1064-1068, 1070, 1072-1078, 1270-1281; PX 102, PX 105, PX 108, PX 109, PX 110, PX 111, PX 112, PX 120, PX 125, PX 132, PX 133, PX 142, PX 323, PX 374, PX 375, PX 376, PX 378, PX 379, PX 441; CR 209. Ex. 19. It was 3M's view that IBM had intentionally released "Merlin" information "like a double agent" (RT 1018-1019).

secretly purchase IBM's "Winchester" computer product out of its San Jose laboratory.[30]

On March 17, 1973, IBM met with the Artichoke at the Saddleback Inn in Santa Ana, California, The Artichoke advised that he had contacted a person named Steckel, and informed IBM that Steckel had advised that "he was quite confident that the "Winchester" information is not yet out, and that he (Steckel), for the right price, could obtain drawings and specifications from sources that he had formerly used within IBM" (PX 356, p. 4; RT 1947-1962; Callahan dep. 09/14/76, Ex 8, p.4). Two days later, IBM provided money to the Artichoke to commence a "buy" of IBM's documents (PX 156). During the period March 23-25, 1973, IBM met with the Artichoke at the Sands Hotel in Las Vegas. He was provided with a further $1,800.00 in one hundred dollar bills for the first "Winchester" purchase. The Artichoke then met with Steckel and gave Steckel the $1,800.00 to continue in the attempt by IBM to purchase "Winchester" out of IBM's San Jose laboratory. At the same time, IBM authorized the Artichoke to offer $50,000.00, "more if necessary", for the total "Winchester" package (PX 157; PX 402, p. 2; RT 659). On March 27, 1973, IBM instituted a "physical surveillance" of Steckel's home (PX 157). On March 31, 1973, IBM met secretly with the Artichoke at San Francisco's Chinatown Holiday Inn. The Artichoke in turn met with Steckel and purchased certain "Winchester" documents from Steckel with the money given him by IBM for that purpose. IBM had its "crime". Three months later IBM would use this "crime" as part of its "industry-wide thunderclap" (PX 164).

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[30] At the time IBM commenced Operation Artichoke it knew that the public authorities would take no action regarding "Merlin", and, with respect to civil actions, knew that the statute of limitations had long ago run. At the same time, IBM was fully confident that its Winchester product had not been compromised (RT 1009-1018, 1109, 1943-1955; RT 278, 2625-2676).

5. IBM Conspires With Police Officials To Fraudulently Obtain The Forro Search Warrant

In April, 1973, IBM went back to the Santa Clara County police authorities with the "Winchester theft" engineered by the Artichoke. IBM agreed to fund a police investigation of its "trade secret losses," and the authorities agreed[31] to "adopt the IBM investigation, and to follow the "investigative direction" previously initiated by IBM (PX 348, p.2; CR 78, p.11).[32] In June, 1973, IBM again violated the order entered by the court in *IBM v. Memorex,* and provided the Santa Clara police authorities with the 1971 Forro deposition transcripts (RT 631-632; RT 724-726). At the time they received the Forro deposition transcripts the police were aware that the transcripts had been provided to them in violation of court order, and were aware that IBM had returned the "Merlin" documents to Forro without restriction (PX 432, PX 433, DX 7358, DX 7359; RT 433-438, 470-474, 486-510, 724-727).

On June 27, 1973, the Santa Clara County police authorities, acting with the assistance of IBM,[33] made application for issuance

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[31] IBM promptly put $50,000.00 in a San Jose bank for police use, only half of which was ever accounted for (RT 657-661). In addition to the $50,000.00 in cash, IBM provided the Santa Clara police with drinks, meals, free travel and other personal amenities (RT 662-664, 715).

[32] IBM recognized the "antitrust implications of an IBM-controlled private investigation of small competing companies" (Forro Ex. 47, p.6). Indeed, "Operation Artichoke" went forward in the face of IBM's statement that such activity carried with it "adverse antitrust considerations in what would amount to or seem to be an investigation or harrassment of competitors." (Forro Ex. 333, p.2).

[33] The affidavit was based in substantial part upon information provided by Richard A. Callahan, an ex-undercover agent of the United States Bureau of Narcotics and Dangerous Drugs, who, at the time, was employed by IBM (PX 465; RT 720-731). It was Callahan who unlawfully provided the police with the 1971 Forro deposition transcripts (RT 631-632, 640-641).

of a warrant authorizing the search of Forro's plant (PX 425).[34] In applying for issuance of the Forro search warrant the police officials fraudulently failed to disclose[35] that IBM had returned the "Merlin" documents to Forro, and failed to disclose returned the "Merlin" documents to Forro, and failed to disclose that the information contained in the affidavit in support had been obtained and was being presented in violation or an order entered by another court (PX 425, PX 432). The Forro warrant issued, and by its terms purported to authorize seizure of every single business document on the Forro premises (PX 425, pp. 1-2).[36]

6. IBM Ransacks Forro's Plant

On June 29, 1973, IBM visited Forro plant with officer R. Tannehill[37] of the San Jose police and "executed" the Forro

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[34] The affidavit in support of search warrant referred specifically to the depositions given by Forro in 1971, and probable cause for the Forro search was predicated upon Forro's possession and use of the "Merlin" documents (PX 425, pp. 22-36). Absent access (admittedly illegal and unauthorized) to the December 1971 Forro deposition transcripts, no warrant would have issued for a search of Forro (RT 500-504, 508-510).

[35] C. Brown, A. Bender and J. Marshall, the Santa Clara County Assistant District Attorneys responsible for drafting the affidavit in support of search warrant, testified that prior to the submission of the affidavit to the issuing judge, they knew IBM had returned the "Merlin" documents to Forro (RT 433-438, 470-474, 486-510). At trial, the District Attorney conceded that IBM's return of the "Merlin" documents was "sort of like a narcotics officer were to place some marijuana in my pocket and then arrest me for it" (RT 494). The same District Attorney acknowledged that "if it were done intentionally to set someone up, obviously it's a setup and it's outrageous, no question about it" (CR 189, pp. 133-134).

[36] The portion of the warrant "describing" the things to be seized is reprinted as Appendix E.

[37] During the search and seizure operation, Tannehill carried a briefcase. In the briefcase was a secret tape recording device. The use of such a device during a search and seizure was unprecedented. The participating IBM personnel were aware of the secret tape recording device. (RT, pp. 1096; 1093-98). Tannehill advised Fowler (Forro's president) of his

search warrant. While the police guarded the doors, IBM personnel began seizing Forro's documents and drawings. (RT, pp. 1172-1174). They took drawings from each machine and assembly; vellums and drawings of IBM's competitors: Burroughs, Nashua (stamped "trade secret"), Memorex, Honeywell, CDC, Pertec, IOMEC, Century Data, Caelus, Ampex, Data General, Alco, Telex, NCR, Freiden, 3M, Toshiba, Potter, Univac, RCA, and Computer Memory; Forro price lists and correspondence with some 30 customers, cost and cost estimates, and a Pertec proprietary spindle. They went through accounting, correspondence, and purchase order files. They took open purchase orders, confidential to Forro and detailing sensitive information about Forro's customers such as price, quality, quantity, and delivery dates for up to a year in advance. (RT 1172-1196; RT 1397-1410; 1172-1196; PX 423; PX 424; DX 92; CR 78, pp., 40-43). After the Forro search had concluded, IBM wrote to the police authorities and congratulated them on the "team effort" (PX 240).

7. The Thunderclap

IBM's program to create a "thunderclap" was, from IBM's standpoint, a total success. Focusing upon the objective and goal of IBM's manufactured event, IBM's Groppuso noted that, with reference to the searches and arrests:

> "The San Jose Mercury News of June 29, 1973, broke the *story* of the arrest of nine people for industrial espionage, that may well become a landmark case in the court. Many, many hours of hard work went into making the June 29, 1973 *story* possible." (PX 278).

AT trial, IBM's Carlton Kwan testified to the intended effect of IBM's "thunderclap" plan:

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right to remain silent. Fowler responded that he did not waive his right. (RT, pp. 2044-48). When one refuses to waive his right to remain silent as had Fowler, the San Jose police procedure was to terminate the interview. Yet, Tannehill continued the interrogation, and the secret tape, and permitted an IBM lawyer, J. Rosetti, to question Forro employees about Forro's suppliers, shifts, number of personnel and other areas of Forro's business (RT, pp. 1176-1177; RT 2297-2299).

Q. This particular memorandum (PX 346) is a meeting that was held in San Jose, is that right?

A. Yes, sir.

Q. The next full paragraph (of PX 346) you say:

> In any case, the goals would be the same; namely, to find the path back into the lab, and also to produce a thunderclap.

A. Yes, sir.

Q. What does that mean to produce a thunderclap?

A. What it means to me is to produce a loud noise.

Q. And that's what you got from this particular meeting with these people?

A. Yes.

Q. And this was one of the goals for this—regarding this proprietary IBM information to make a lot of noise?

A. Yes, sir.

Q. And was one of the ways to do that would be incident publicity from such a thunderclap?

A. That would be one of the ways, the existence of this investigation producing a thunderclap?

* * *

Q. Are you aware that certain indictments were issued against certain people and searches and seizures were taking place in the latter part of June, 1973, Mr. Kwan?

A. Yes, sir.

Q. And were you aware of the publicity incident to those events?

A. Yes, sir.

Q. And was there publicity throughout the industry?

A. I remember seeing it in the copies of the San Jose newspapers.

Q. Did you see it in any other publications?

A. Not that I can recall.

Q. Did you see it in any national magazine?

A. Not that I recall.

Q. Did you see it in the *Wall Street Journal?*

A. I don't recall. There may have been an article in the *Wall Street Journal.*

Q. Did you see it in the trade publications?

A. Not that I can recall.

Q. Was this what you understood what one of the goals was, was this the noise that you understood one of the goals was to produce?

A. I'd say that would fall into it, yes. (RT 916-924).

As intended by IBM, its conduct, including "Operation Artichoke," produced the anticipated industry-wide thunderclap of publicity and, as previously found by the jury, substantially interfered with and damaged Forro's business relationships. The "crimes" which resulted from "Operation Artichoke" were highly publicized in the local and national news media, and received prominent attention in business publications such as *The Wall Street Journal* and *U.S. News and World Report* where it was reported that "the Roundup of Thieves Had Begun" (RT 550-573, 606-614, 923-925, 925-936, 1200-1202, 1328-1342; PX 227, PX 293, PX 311, PX 392, PX 398, PX 414, PX 417).[38]

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[38] The record is replete with evidence demonstrating the actual effect of IBM's thunderclap of adverse publicity on Forro's customer relationships. Forro customers testified at trial that IBM's thunderclap in fact caused them to either cancel or not increase their business with Forro (e.g. R.T. 554-573; R.T. 609-617; R.T. 928-931). Indeed, although IBM challenged the amount of Forro's damage at trial, it never questioned the evidence that Forro's damages were in fact caused by IBM's thunderclap program.

VI

REASONS RELIED ON FOR ALLOWANCE OF THE WRIT

A. Forro I

1. The Constitutional Question Is Begged

The court of appeals failed to consider the validity of the Forro search. Instead, it stated "Forro does not argue that the actions of either the police or the IBM personnel in conducting the search *exceeded the authority conferred by the warrant.*" (Appendix A, p. 11). But this begs the question entirely. The evidence, and the contention of Forro at trial, was that the *warrant itself* was outrageously and unconstitutionally overbroad, and the court of appeals was bound to make its own independent evaluation[39] as to whether the warrant was itself constitutionally permissible.

Here no such independent judgment was made by the court of appeals. Had it been made, the court of appeals would have been required to find that the Forro search warrant was unconstitutionally overbroad and invalid. Indeed, one of the deputy district attorneys who participated in drafting the Forro search warrant conceded that the descriptive terms used in the warrant were so wholly nonspecific that the identification of the things to be seized was left entirely to the discretion of IBM:

"Q. Wouldn't it be true that the IBM engineer on the Forro search would be in a position to designate each and every document found on the premises as coming within the call of the search warrant?

THE WITNESS: I guess if all their documents were IBM documents, it would be possible.

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[39] *Burrows v. Superior Court,* 13 C.3d 238, 249-250 (1974). As stated by the court in *People v. Superior Court (Williams),* 77 Cal.App. 3d 69 (1978):

> "Whether the description in the warrant is sufficiently definite is question of law on which an appellate court makes an independent judgment" *Id* 76-77.

Q: I'm saying whether they were or not, and because the police had to rely upon the IBM people in order to state whether or not the document had a tolerance or specification that was alleged to be an IBM tolerance or specification, wouldn't those circumstances put the IBM people who went down on the search in a position of seizing every single document on the Forro premises?

THE WITNESS: If they had been so motivated, they would have physically been in that position, sure."(CR 189, pp. 118-119).[40]

In our case the court of appeals relied in part upon California Penal Code section 1530 in determining[41] that IBM's participation in the Forro search was privileged. But the court entirely failed to account for the fact that the warrant left the identity of the things to be seized to the unfettered discretion of those executing the warrant, a circumstance which is not cured by Penal Code section 1530. Thus, on exactly analogous facts, the court in *People v. Superior Court (Williams), supra,* held:

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[40] R. Tannehill, the San Jose police officer who served the Forro warrant, testified:

Q. Is it a fact that the law enforcement officers, including yourself, who were present at the search of the Forro premises had to rely upon the IBM personnel also present in order to ascertain whether or not the documents and computer parts present on the Forro premises were called for under the search warrant which was executed?

A. That's true.

Q. So procedurally, during the search of the Forro premises did you receive information from the IBM personnel present there that these documents or these computer parts were responsive to the search warrant?

A. Yes, sir.

Q. And did you on the basis of those representations seize the articles identified by the IBM personnel?

A. Yes, sir. (CR 78, pp. 41-42).

[41] As discussed *infra,* the court's ruling has no precedent in California law; ignores the evidence that IBM and the police were acting pursuant to an unlawful conspiracy; and ignores the evidence that the police acted with malice.

> We reject the contention of petitioner that the informant can legitimately be used at the scene to point out what items should be seized. Such a concept violates the rule of leaving no matters to the discretion of the officer.... The aid contemplated by Penal Code section 1530 is aid in executing the warrant, not in making the warrant sufficient. Specificity must be shown in the warrant itself and cannot be supplied at the scene by the informant. To allow otherwise would be to thwart the main purpose of a warrant, which is to interpose a cool, detached, judicial mind between the officers and the search to eliminate discretion in the officers." *Id* 78-79[42]

The validity of the Forro warrant is a question which was fundamental to Forro's claim that its business records had been unlawfully seized. The failure of the court of appeals to consider the constitutional validity of the Forro warrant worked an obvious and substantial prejudice to Forro's procedural and substantive rights.

2. The Police Conspiracy is Disappeared

Forro's intentional interference claim was predicated upon a contention that IBM had unlawfully conspired with police and prosecutorial officials.[43] This point was not addressed by the court of appeals. Rather, in a fundamental misconstruction of Forro's claim the court of appeals stated:

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[42] F. Gropusso, an IBM employee who participated in the Forro search and seizure testified that he was unable to determine whether a document contained an "IBM specification or tolerance" without analyzing the document "side-by-side" with an IBM document (RT 2671). K. Swanson, another IBM employee participating in the Forro search, testified to the same effect (RT 1654-1658). Notwithstanding this fact, no IBM drawings were brought to the Forro plant by the police or IBM (RT 1653-1654, RT 2670-2671).

[43] The question of whether IBM conspired with police authorities was clearly a question of fact for the jury to decide in connection with Forro's intentional interference claim. *People v. Gordon*, 71 C.A.2d 606, 629 (1945). And, where, as here, the evidence is in conflict, the appellate court is bound not to disturb the jury's verdict, *Crawford v. Superior Court*, 3 C.2d 427 (1935).

> "Although Forro would have us view IBM as a puppeteer directing the actions of the police, our review of the record convinces us that the evidence provides no basis for inferring that the police were not in charge of obtaining the search warrant and the conduct of the search itself." (Appendix A, p. 11).

But Forro's contention, and the evidence at trial, was not that the police were "puppets," but that they had been bought and paid for.[44] The evidence at trial was that, as part of its cooperative effort with IBM, the *police and prosecutorial officials maliciously* and fraudulently obtained the Forro search warrant, a circumstance which, by itself, negates any civil immunity that might otherwise attach. California Civil Code § 43.5(a); *Mckay v. County of San Diego,* 111 Cal.App.3d 251 (1980). With respect to the withholding of significant exculpatory evidence—here IBM's 1971 return of the "Merlin" documents—the California courts have specifically declared that it is for the trier of fact to weigh the available inferences as to malice. Thus, in *Liable v. Superior Court* 157 Cal.App.3d 44 (1984), a civil damage action, the court reversed an order granting summary judgment in favor of the defendant and stated:

> "Withholding exculpatory evidence from the magistrate may not be malice in spades, but if deliberate or with reckless disregard of the plaintiff's liberty interests it may nonetheless be malicious . . . Where, as asserted here, significant exculpatory evidence has been withheld, an inference of malice may reasonably be drawn. It is for the trier of fact, not the law and motion court, to weigh the available inferences against Inspector Ryan's profession of pure motives." *Id* 53[45]

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[44] The offering of anything of value to a police or prosecutorial official with the intent to unlawfully influence police action is a felony under California law, California Penal Code § 67.

[45] Here the court of appeals not only failed to consider the IBM—police conspiracy, it paid no attention to Forro's claim that the police authorities had acted with malice in executing the Forro warrant. Thus, for example, nothing is said concerning the fact that the police

The record below clearly shows that Forro's business records were seized pursuant to a warrant which was unconstitutionally overbroad. The jury was fully entitled to consider the evidence on this point together with the evidence demonstrating that issuance of the warrant was based upon fraud,[46] and that the warrant had been obtained and executed pursuant to a conspiracy between IBM and police officials to unlawfully and maliciously interfere with Forro's business relations. The court of appeals had an affirmative obligation to consider and apply state law to the claims *actually* made by Forro.[47] Had it done so, it would have been required to reject IBM's claims of immunity and privilege and to affirm the jury's verdict.

B. Forro II

In Forro II the panel stepped directly into error by stating that the Forro I panel had determined that IBM's participation in the

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permitted an IBM lawyer to secretly tape record Forro employees during the search and seizure.

[46] It is in this case established that the affidavit submitted to the Judge in support of the Forro search entirely omitted material facts which could have had an adverse effect upon the normal inference—drawing process of the Judge, and violated the duty to disclose to the Judge all material facts relevant to the issue of probable cause. *Theodor v. Superior Court*, 8 Cal.3d 77 (1972); *People v. Barger*, 40 C.A.3d 662 (1974); *Morris v. Superior Court*, 57 C.A. 3d 521 (1976); *Rodriquez v. Superior Court*, 87 C.A.3d 822 (1978).

[47] With respect to IBM's communications to authorities and the question of whether such communications were privileged by California Civil Code § 47(2), the court of appeals indicated that there was support in the record for the proposition that IBM's communications were intended to produce a thunderclap of publicity to discredit Forro in the eyes of its customers 623 F.2d 1045, 1056. Notwithstanding this circumstance, and the teaching of the court in *Frisk v. Merrihew*, 42 Cal.App.3d 319, 326 (1974) that: "The question of whether a privileged occasion was abused is for the determination of the jury unless the facts permit but one conclusion" (emphasis is in original), the court of appeals held that all of IBM's communications were absolutely privileged as a matter of law, *id* 1056.

Forro search was protected by California Civil Code § 47(2).[48] From there, the court proceeded to exacerbate and compound the errors committed in Forro I.

In the first instance, the panel entirely ignored the law of the case on damages established by the court of appeals in Forro I.[49] This was clear and highly prejudicial error, *Moore v. Jas. H. Matthews & Co.*, 682 F.2d 830, 833-834 (9th Cir.) 1982. Instead, the court chose to select certain of the individual bits and pieces of the evidence considered by the jury, and to discard each on the ground that, when viewed separately, the item could not have caused Forro's injury. This is an entirely impermissable appellate procedure, *Continental Ore v. Union Carbide & Carbon Corp.*, 370 U.S. 690 (1962).

The court next cited a decision of a California court of appeals for the proposition that it was "California's manifest policy (to) resolve doubts in favor of extending (the) privilege (afforded by California Civil Code § 42(2)" (Appendix C, p. 34). The case cited by the court, *Twyford v. Twyford* 63 C.A. 3d 916 (1976) was, in the first instance a pleading case, and in no way purports to authorize appellate reversal or vacation of a jury verdict. In the second instance, the facts pleaded in *Twyford* (a domestic squabble between husband and wife) were in no way analogous to the facts considered by the jury in this case—*e.g.*, there was no allegation of a conspiracy with police authorities. Thirdly, to the extent it is pertinent at all, *Twyford* simply quoted another

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[48] Appendix C, p. 33, ftnt. 2. In fact, the panel deciding Forro I found no California law directly in point, but concluded that the Supreme Court of the State of California would find IBM's participation in the police search privileged by reference to California Penal Code §§ 830.6 and 1530. Not California Civil code § 47(2). (Appendix A, pp. 10-13).

[49] In Forro I the court stated that "California law requires that the fact of injury must be proved with certainty," and held "we hold that Forro introduced sufficient evidence on the damages question to support the jury's verdict . . . Accordingly, there need be no new trial on the damages issue" (Appendix A, pp. 7-9).

California pleading case to the effect that, for purposes of considering whether a publication had been made *in* a judicial proceeding within the meaning of 47(2), "All doubts are to be resolved in favor of relevancy and pertinancy" *id* 926. *Twyford* does not permit judicial "extension of the privilege" accorded by statute, nor does it conflict with the holding of the court in *Frisk v. Merrihew, supra, viz "The question of whether a privileged occasion was abused is for the determination of the jury* unless the facts permit but one conclusion," *id* 326 (emphasis in original).

Lastly, the court of appeals determined that Forro's reliance upon the California Supreme Court's decision in *Gruenberg v. Aetna*, 9C.3d 566 (1973),[50] was misplaced," stating:

> In *Gruenberg*, the cause of action against the insurance company "transcended" the privileged acts because those acts were separate and *independent* of the essential wrongful conduct alleged: unjustified failure to pay amounts owed under the contract of insurance. Here, by contrast, all Forro's injury arose directly from the police search, for which we have held IBM protected by the Civil Code § 47(2) privilege." Appendix C. p. 33, ftnt 2. (Emphasis added).

Contrary to what the court of appeals had to say, the *Gruenberg* court did not hold or in any way suggest that the privileged

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[50] In *Gruenberg, supra*, the false but privileged statements were made by a claims adjuster and an attorney who allegedly acted in concert with the defendant insurers, *id* 570-571. Here, the evidence was that the San Jose police and prosecutorial authorities submitted a false (arguably privileged) affidavit to a judge, and that in doing so the police authorities acted in concert with IBM. The fact that IBM enlisted the support of third parties cannot serve to insulate it from answering in damages for the effect of its own, privately conceived program. And the injury resulting from such a program is most certainly compensable.W. Prosser, *Law of Torts*, § 41 at 238-239; § 45 at 289-290 (4th ed. 1971). *Hoffman v. Halden*, 268 F.2d 280, 297 (9th Cir. 1959); *Gruenberg v. Aetna Insurance Co.*, 9 Cal.3d 566, 575-576 (1973); *Vesley v. Sager*, 5 Cal.3d 53, 162-164 (1971); *Paula v. Gagnon*, 81 Cal.App.3d 680, 683-685 (1978).

statements made by the agents were *"independent"* of the wrongful conduct alleged. To the *direct* contrary, the plaintiff in *Gruenberg* alleged a "concert of action" between and among the agents and insurers, and the Supreme Court determined that the overall "transcendent" scheme to act in bad faith and deal unfairly with the plaintiff had been implemented and directly furthered by the agents' privileged statements. Indeed, that was the entire essence of the complaint considered by the court, *id* 570-576. Indeed, the *Gruenberg* court held that suit *could* be maintained[51] for breach of an implied covenant of good faith and fair dealing on the part of insurers *notwithstanding* that statements made by agents of the insurers were within the privilege afforded by California Civil Code section 47(2), *id* 575-576. *Gruenberg*[52] controls the record in this case and, by itself, mandates reversal.

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[51] The *Gruenberg* court permitted plaintiff a right to maintain suit not only for amounts owed under a contract of insurance, but for damages based upon loss of earnings; business bankruptcy; litigation expenses; medical expenses and mental distress, *id* 580. *Also see: Kinnamon v. Staitman & Snyder,* 66 Cal.App.3d 893 (1977), denying application of the privilege to an attorney's conduct violative of the Rules of Professional Conduct.

[52] *Gruenberg* is entirely consistent with long-settled tort law principles declaring that lawful, innocent or privileged acts lose their character as such when shown to be parts of a larger unlawful scheme—here an intentional and altogether successful effort to interfere with Forro's business relationships, *Swift & Co. v. United States,* 196 U.S. 375, 396, 25 S.Ct. 276, 279 (19); *American Tobacco Co. v. United States,* 328 U.S. 781, 809, 66 S.Ct. 1125, 1138 (19); *Continental Ore Co. v. Union Carbide & Carbon Corp.,* 370 U.S. 690, 707, 82 S.Ct. 1404, 1414-1415 (1962); *California Motor Transport Co. v. Trucking Unlimited,* 404 U.S. 508, 512, 518 (1972); *Clark v. Lesher,* 106 Cal.App.2d 403, 409 (1951).

VII

CONCLUSION

The decisions of the court of appeals below conflict directly with decisions of this Court and the California Supreme Court, and so far depart from the accepted and usual course of judicial proceedings as to require an exercise of this court's power of supervision. Beyond the Constitutional questions of search and seizure and right to trial by jury, the whole question of civil liability for damages caused by privately financed "sting" operations—a question squarely presented here—is one which is bound to have important legal ramifications for competition and business ethics generally.

For these reasons Forro respectfully requests that this court allow issuance of its writ. Forro asks that the decisions of the court of appeals be reversed, and asks that judgment be reinstated on Forro's intentional interference claim in accordance with the jury's verdict.

Respectfully Submitted,

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Appendix A

Forro Precision, Inc.,

Plaintiff-Appellant,

v.

International Business Machines Corp.,

Defendant-Appellee.

Nos. 78-1455, 78-1755.

United States Court of Appeals, Ninth Circuit.

Argued and Submitted May 12, 1980.

Decided April 5, 1982.

Rehearing and Rehearing En Banc
Denied July 7, 1982.

FLETCHER, Circuit Judge:

This action arises from a series of events in 1972 and 1973 that culminated in the search of the business premises of Forro Precision, Inc. (Forro) by the San Jose police, who were accompanied by and aided in the search by employees of the International Business Machines Corp. (IBM)[1] Forro brought suit against IBM on the basis of its participation in the search and

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[1] This is the second case before this court involving the same course of events. The plaintiff in *Arnold v. International Business Machines Corp.*, 637 F.2d 1350 (9th Cir. 1981), was one of the persons implicated in the theft of IBM secrets. He brought an action under 42 U.S.C. §§ 1983 and 1985, on the theory that IBM violated his civil rights by giving false and misleading information to the San Jose police that resulted in the search of his residence and in his arrest and subsequent indictment.

We there affirmed the trial court's grant of summary judgment to IBM because the plaintiff failed to show that IBM was the proximate cause of the search, arrest, and indictment. On the record of that case, we found no facts that indicated that IBM ultimately controlled the decisions of the police, and therefore IBM's actions could not be said to be the legal cause of the police actions that injured plaintiff.

other conduct damaging to Forro. IBM, in turn, counterclaimed against Forro.

After extensive pretrial proceedings, the claims by Forro were narrowed to contentions that IBM had intentionally interfered with prospective business advantage under California law and had monopolized and attempted to monopolize in violation of section 2 of the Sherman Act, 15 U.S.C. § 2 (1976). IBM's contentions were narrowed to a counterclaim under California law that Forro had misappropriated its trade secrets. A jury found in favor of Forro on the intentional interference claim and awarded actual damages in the amount of $2,739,010. It found in favor of IBM on the misappropriation claim and awarded actual damages in the sum of $260,777, but deadlocked on the antitrust claims and on both parties' claims for punitive damages.

The trial judge initially declared a mistrial on Forro's Sherman Act section 2 claims, but later entered judgment in favor of IBM in this aspect of the case. The trial judge further ordered that neither party recover punitive damages.

Both parties appeal, IBM from the judgment for Forro on the intentional interference claim and Forro from the judgment for IBM on the misappropriation claim. Forro also appeals from the dismissal of its antitrust claims. This court has jurisdiction under 28 U.S.C. §§ 1291 and 1294.

I

FACTS

IBM designs, manufactures, and markets a complete line of electronic data-processing equipment. This lawsuit concerns disk drives and disk packs, which are one portion of the line. The function of disk drives and packs is to provide rapid storage and retrieval of data. The devices are components separate from the "main frame" of a computer, and, along with other modular equipment, are known as "peripheral equipment." Peripheral equipment designed to work with a manufacturer's main frame computer is termed "plug compatible." Companies other than

IBM that manufacture such components are known as plug-compatible manufacturers, of "PCM's."

Forro is not a PCM, but rather is a manufacturer of precision metal parts purchased by PCM's for incorporation in peripheral equipment. Forro ordinarily manufactures components in accordance with drawings and specifications provided by its PCM customers. Forro has on occasion, however, offered parts manufactured under Forro's own "FP" designation.

During the late 1960's and early 1970's, IBM was developing a disk storage device called the 3330, or "Merlin." IBM announced the Merlin to the trade in June, 1970. The first customer shipment of the Merlin was set for August, 1971. Forro offered Merlin parts, under its own FP designation, in mid-1971, prior to IBM's shipment date. The date of shipment is significant because it is the first date upon which the devices could be acquired legitimately and "reverse engineered." Prior to that time, detailed technical specifications would necessarily originate in IBM's shop.

In late 1970 and early 1971, IBM became aware of rumors that its security had been breached and that its new Merlin design was "out." These rumors were substantiated on two occasions, when companies in the industry voluntarily turned over to IBM Merlin drawings that had come into their possession. At about the same time, during discovery in a trade secret lawsuit brought by IBM against Memorex Corporation IBM acquired information that led it to suspect that Forro had supplied to Memorex parts manufactured from Merlin designs.

Subsequently, in December, 1971, as part of its discovery in the *Memorex* lawsuit, IBM deposed Forro's president, Fowler, and its general sales manager, Knisely. At these depositions, Fowler and Knisely produced drawings of Merlin parts. They testified at the depositions in the *Memorex* case, and later at trial in this case, that Forro acquired the drawings in May of 1971 from a Mr. Shinn, an employee of another company, Sigma Technology. Shinn had submitted the drawings, which bore the Sigma Technology logo, to Forro as part of a request for a quote on the

machining of certain of the parts. After verifying that the documents were authentic Merlin drawings, Forro intentionally submitted a very high bid and lost the Sigma Technology business. Forro copied the drawings prior to returning them to Shinn, and changed the Sigma Technology logo to a Forro logo. Forro subsequently offered for sale under its own FP designation Merlin parts manufactured from these drawings.

The Fowler and Knisely depositions in the *Memorex* litigation were taken under a stipulation that the depositions would be subject to a protective order and that the originals of all documents produced pursuant to subpoena would be returned to Forro. Within a week of the taking of the depositions, IBM returned the Merlin documents to Forro without restriction.

IBM became convinced that leaks of the Merlin drawings came from its San Jose laboratory. IBM initiated an investigation in 1972. In the course of this investigation, an informant told IBM that he had heard a rumor that Forro had technical information on the 3340, or "Winchester," Data Module. The first shipment of the Winchester device was not scheduled until November, 1973. IBM persuaded the informant to visit Forro and attempt to confirm the rumor. The informant contacted Forro but was unable to verify the rumor.

At trial, IBM introduced testimony of Fritz Damm, the former general manager of Damm and Zoon a Dutch precision machine firm that produced Winchester parts for IBM. Damm testified that Fowler had contacted him several times in late 1972 and early 1973, attempting to acquire Winchester drawings and specifications from Damm. Fowler implied that Forro was already making certain Winchester parts. Although Damm testified at trial that he had delivered Winchester drawings to Fowler two weeks before the search of Forro, none of the drawings were uncovered in the search.

Forro began selling FP Winchester parts shortly after IBM's first shipment in November, 1973. Fowler testified that the specifications for Forro's FP Winchester parts were acquired through reverse engineering that took place immediately after the

Winchester's first shipment date, and that he had not acquired any proprietary Winchester information through Damm. Fowler's testimony was belied by testimony of Forro's general sales manager, Knisely, that he had seen a copy of the Winchester specifications in Fowler's office almost a year before the alleged reverse engineering could have taken place. Fowler's testimony was also placed in question by the fact that one of Forro's parts exhibited characteristics peculiar to the European-made versions of the part. The European version of the Winchester parts were not shipped until after the date of the drawing that Fowler claimed was created by reverse engineering.

By March, 1973, IBM had arranged through an undercover agent to buy from a man named Steckel an entire set of illicit Winchester drawings for $75,000. At that time, IBM had still not discovered the source within IBM. IBM decided to seek the aid of local Santa Clara County law enforcement officials in order "to find the path back into the lab, and also to produce a thunderclap" of adverse publicity for the firms implicated in the illicit trade.

In late March and early April, 1973, IBM officials met with representatives of the California Attorney General's office and Santa Clara County law enforcement officials to discuss what actions to take to discourage trade secret thievery. The San Jose Police Department, with the involvement and consent of the Santa Clara County District Attorney, agreed to take over the investigation. The investigation thenceforth became a cooperative effort between the police and IBM. An IBM undercover agent continued his work under police supervision. Funding for the investigation came from IBM in the form of cash payments totalling $24,300.

In June, 1973, warrants were issued for the search of eight locations, including the Forro facility. Probable cause to search Forro's place of business was predicated on the suspected presence of unlawfully acquired Merlin drawings. The police affidavits offered in support of the warrants were based in part on the 1971 *Memorex* depositions of Fowler and Knisely, and on IBM assertions that the documents produced by Forro had been IBM

documents. IBM neglected to tell the police that IBM had returned the documents to Forro after the depositions.

Forro's Los Angeles plant was searched on June 29, 1973. The search lasted approximately twelve hours. Five IBM employees accompanied the police to aid in examining the seized material to see that it matched that described in the warrant. About four hundred drawings were seized, as well as price lists, correspondence, cost documents, and purchase orders. During the course of the search, Fowler and his son hid documents in a false ceiling and in a car, allegedly out of fear that a seizure of all documents would put Forro out of business.

The search of Forro's premises was widely publicized in industry trade journals. Forro incurred out-of-pocket expenses in the amount of $79,000 as a result of the search, and allegedly suffered further losses in sales and profits as a result of the adverse publicity. Although the investigations led to ten indictments, no indictment was sought against Forro or any of its employees or principals.

II

INTENTIONAL INTERFERENCE WITH CONTRACT

The jury found for Forro on its claim that IBM intentionally interfered with Forro's contractual relationships. Forro's theory is two-fold: first, that IBM orchestrated and participated in a police investigation of Forro in order to subject the company to a "thunderclap" of adverse publicity and thereby disrupt Forro's business relationships, and second, that IBM used deceitful means to persuade the police to cause the issuance of the search warrant for Forro's plant and then participated in the ensuing search and seizure of Forro's business records.

IBM, in challenging the verdict, raises several issues. It contends that:

> (1) Forro did not introduce sufficient evidence upon which the jury could base its assessment of damages;

(2) The trial court abused its discretion in denying IBM's rule 37 motion to dismiss, which was based on alleged destruction of evidence by Forro; and

(3) IBM's communications with law enforcement authorities and participation in the search of Forro's premises was privileged.

We hold that Forro introduced sufficient evidence on the damages question to support the jury's verdict and that the trial court did not abuse its discretion in denying the motion to dismiss. Accordingly, there need be no new trial on the damages issue. We find, however, that IBM's communications to the authorities and participation in the search were privileged, and therefore we reverse.

A. Sufficiency of Forro's Proof of Damages

Forro alleged that IBM's conduct caused it to incur out-of-pocket expenses of $79,000 and lost profits during 1974-1977, estimated on alternate theories to be $2,657,000 or $8,856,000. The jury agreed with Forro's lower estimate of lost profits and awarded $2,739,010 in compensatory damages. The lower of the two proffered figures was based principally on the opinion of Forro's president, Fowler. It was, in turn, based upon testimony adduced at trial from Forro customers, that Forro's business would have grown during the damages period by 30 per cent, and that Forro would have made 25 per cent profit on these incremental revenues.

IBM contends that Fowler's use of the 30 per cent growth factor was not justified by the testimony of Forro's customers nor by Forro's own internal growth projections and limits on its capacity to expand. IBM also attacked Fowler's assessment of the profit margin Forro would have realized from the incremental business.

We agree that proving damages is part of Forro's burden of showing a prima facie right to relief. We find that Forro introduced sufficient evidence to go to the jury.

Cal.. ·rnia law requires that the fact of injury must be proved with certainty. However, once injury is established, California law allows the factfinder considerable latitude in ascertaining the *amount* of the award. The California courts recognize that ascertaining what profits would have been gained in the absence of tortious conduct is an inherently speculative endeavor.[2] *Drouet v. Moulton,* 245 Cal.App.2d 667, 54 Cal.Rptr. 278, 281-82 (1966); *see also Continental Car-Na-Var Corp. v. Moseley,* 24 Cal.2d 104, 113, 148 P.2d 9, 14 (1944).

IBM's arguments are directed principally to the certainty of amount, not the fact of injury. We find the jury could reasonably have inferred from the evidence presented that Forro lost business as a result of damage to its customer goodwill. Forro introduced evidence of the post-search publicity that implicated Forro in the

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[2] The California Court of Appeal explained this distinction as follows:

> Generally speaking, there is no doubt that when the operation of a business is interrupted by wrongful acts, damages, whether of prospective profits or otherwise, should be ascertained with reasonable certainty from the past volume of business and other provable data, generally of a mathematical nature, relevant to what the profits were and what profit probabilities would have been or would be if the wrongful act had not been perpetrated.
>
> It is also true, however, that "[t]his rule does not apply to uncertainty as to the *amount* of the profits which would have been derived, *but to uncertainty* or speculation as to *whether the loss of profits was the result of the wrong and whether any such profits would have been derived at all.*"
>
> . . . .
>
> A wrongdoer should not escape liability for his wrong because damages cannot be measured with exactness.
>
> Under the circumstances herein delineated, it is for the trier of fact to use the evidence available in assessing damages. "It is axiomatic that where substantial compensable injury is shown but the amount of the damage cannot be ascertained with reasonable certainty . . . ,the question rests in the sound judgment and discretion of the trier of fact."

Drouet v. Moulton, 245 Cal.App.2d 667, 54 Cal.Rptr. 278, 281-82 (1966) (emphasis supplied in part) (citations omitted).

traffic in stolen trade secrets, as well as testimony of some of its customers that the search was a factor in their decisions not to buy from Forro. This was sufficient evidence from which the jury could have inferred the existence of an injury. On the matter of the amount of damages, we find that the evidence was sufficient to support the jury's award.

B. Dismissal for Destruction of Evidence

IBM moved under rule 37 of the Federal Rules of Civil Procedure to dismiss Forro's intentional interference claim because Forro allegedly destroyed blueprints that would have allowed IBM to trace the incorporation of its trade secrets into Forro's products. The district court viewed the evidence as conflicting with regard to whether Forro had destroyed evidence, and denied the motion.

The decision to impose sanctions under rule 37 is in the trial court's discretion. *United States v. Sumitomo Marine & Fire Ins. Co.*, 617 F.2d 1365, 1369 (9th Cir. 1980).We do not think that IBM so clearly demonstrated its right to sanctions that we could say that the district court abused its discretion. We accordingly affirm the denial of the motion.

C. Privilege for Communicating with and Assisting Authorities

IBM contends that its solicitation of police aid and its assistance in the search of Forro's premises are privileged under California law. The trial court ruled against IBM on these points and refused to give IBM's jury instructions on privilege. The judge instructed the jury,[3] however, that California's policy of

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[3] The trial court's instruction of IBM's justification defense was as follows:

Instruction Number 43

In addition to denying any wrongful or intentional interference with any prospective business advantage of the plaintiff, the defendant raises the defense that its conduct was justified under all of the circumstances shown by the evidence in the case.

The defendant has the burden of proof on this defense of justification. If you find from a preponderance of the evidence that

encouraging citizens to report criminal activities to the authorities should be considered by it as a factor in determining whether IBM's conduct was justified.[4]

1. *IBM's participation in the search*

In deciding whether the trial court erred in refusing to instruct that IBM's participation in the search was privileged, we must

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the defendant was justified in the acts of which the plaintiff complains, then you should find for the defendant and against the plaintiff on the claim of intentional interference with plaintiff's prospective business advantage.

The defendant claims by way of justification that it was motivated by its desire to protect its trade secrets or proprietary information. Further, IBM claims justification based on the social duty of good citizens to aid in proper enforcement of the criminal laws.

I instruct you that a party has a right to take reasonable steps to protect its trade secrets and proprietary information from improper use by unauthorized persons.

I also instruct you that there is a strong public policy to encourage all citizens to assist law enforcement agencies by reporting criminal activities, and by cooperating with the duly authorized civil authorities in carrying out the law enforcement duties assigned to such authorities.

[4] California recognizes justification as an affirmative defense to the torts of interference with a contractual relationship and interference with prospective advantage. The defense was explained by the California Supreme Court as follows:

> Whether an intentional interference by a third party is justifiable depends upon a balancing of the importance, social and private, of the objective advanced by the interference against the importance of the interest interfered with, considering all circumstances including the nature of the actor's conduct and the relationship between the parties.

Herron v. State Farm Mut. Ins. Co., 56 Cal.2d 202, 206-07, 363 P.2d 310, 312, 14 Cal.Rptr. 294, 296 (1961). *See also Lowell v. Mother's Cake & Cookie Co.*, 79 Cal.App.3d 13, 18, 144 Cal.Rptr. 664, 667-68 (1978); *A. F. Arnold & Co. v. Pac. Professional Ins., Inc.*, 27 Cal. App.3d 710, 713-16, 104 Cal.Rptr. 96, 98-100 (1972).

apply California law. Our examination of the evidence adduced in this case and applicable California law leads is to conclude that the Supreme Court of California would hold that IBM's actions in assisting the police in making the search were privileged and could not serve as a basis for civil liability.[5]

The search of Forro's premises was conducted under authority of a validly issued search warrant. The police obtained the search warrant from a magistrate. The police requested IBM's aid in conducting the search because the search warrant required that technical documents be identified. A layman would not have had the expertise to identify the drawings containing IBM product specifications. Teams composed of police officers and IBM employees conducted the search. The IBM employees were accompanied by an officer at all times and acted under direct police supervision. The officer in charge of the search personally reviewed all materials to decide whether they should be seized. Forro does not argue that the actions of either the police or the IBM personnel in conducting the search exceeded the authority conferred by the warrant. Although Forro would have us view IBM as a puppeteer directing the actions of the police, our review of the record convinces us that the evidence provides no basis for inferring that the police were not in charge of obtaining the search warrant and the conduct of the search itself.

California allows officers to request the aid of citizens in executing search warrants. *People v. Turner,* 249 Cal.App.2d 909, 927, 57 Cal.Rptr. 854, 865, *cert. denied*, 389 U.S. 963, 88 S.Ct. 348, 19 L.Ed2d 375 (1967); Cal.Penal Code § 1530 (West 1970). The California legislature has provided that a citizen aiding an officer has such powers as the supervising officer may

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[5] We have found no California case directly in point on the question of whether a private citizen may be subjected to civil liability when, at a peace officer's request, he aids the officer in conducting a search. Therefore, we must derive from a review of relevant California law the result the California Supreme Court would reach if presented with this case. *Scandinavian Airlines System v. United Aircraft Corp.*, 601 F.2d 425, 427 (9th Cir. 1979).

delegate. Cal.Penal Code § 830.6(b) (West Supp. 1980). The officer himself is immune from suit arising out of the execution of a valid warrant. *Vallindras v. Massachusetts Bonding & Ins. Co.*, 42 Cal.2d 149, 265 P.2d 907, 910-11 (1954); Cal.Civ.Proc.Code § 262.1 (West 1954). The California legislature has not, however, expressly provided for such immunity for the citizen assisting a search.

We think that California Penal Code section 830.6(b) must be understood as according a citizen immunity that derives from the officer's own immunity. This result is supported by two California cases.

In *Peterson v. Robison*, 43 Cal.2d 690, 697, 277 P.2d 19, 24 (1954), the California Supreme Court held that a private citizen is not subject to an action for false imprisonment when he makes an arrest at a peace officer's request. The court reasoned that it would be unfair to impose civil liability on a person when a California statute made it a misdemeanor to refuse an officer's request to aid in an arrest.

A more recent California Supreme Court case, *Sokol v. Public Utilities Comm'n*, 65 Cal.2d 247, 418 P.2d 265, 53 Cal.Rptr. 673 (1966), held that a public utility was not civilly liable for disconnecting the plaintiff's phone after receiving notification from the local police chief that the phone was being used for illegal purposes. A state Public Utilities Commission regulation required the phone company to disconnect phone service whenever it had reasonable cause to believe that a subscriber was using the phone for an illegal purpose, and further provided that notice from a law enforcement officer of such usage was sufficient to constitute reasonable cause. The court noted by reference to *Peterson* that it would be unfair to impose liability on a person for doing what the law requires, and stated further that "[a] contrary rule would not only be inequitable but would discourage cooperation with law enforcement agencies." 65 Cal.2d at 258, 418 P.2d at 272, 53 Cal.Rptr, at 680.

We conclude that the California courts would extend the reasoning of *Peterson* and *Sokol* to provide immunity to IBM. An

attempt to distinguish this case from *Peterson* and *Sokol* on the basis that no statute required IBM to assist the police in searching Forro's premises is unconvincing. The principal basis for the holdings in the California cases is the policy of encouraging citizens to aid the police. Police officers occasionally have need to seek help from private citizens in conducting valid searches. Indeed, such assistance may be more necessary to the police in the context of a search, where technical knowledge may be wanting, than in the arrest context addressed in *Peterson*. A citizen should not have to assess his potential civil liability when presented with a reasonable police request for assistance. Otherwise, citizen cooperation might be deterred.

2. *IBM's Communications to Authorities*

IBM contends that all of its communications to the authorities were absolutely privileged under section 47(2) of the California Civil Code (West Supp. 1980), which provides:

> A privileged publication or broadcast is one made—
>
> . . . .
>
> 2. In any (1) legislative or (2) judicial proceeding, or (3) in any other official proceeding authorized by law. . . .

At trial Forro tried to show that IBM secured the cooperation of the San Jose Police through misrepresentation and fraud. Specifically, Forro asserted that IBM failed to inform the police that a protective order shielded the depositions on which the affidavit in support of the search warrant was based, failed to disclose that IBM's counsel had returned without restriction the Merlin drawings produced at the depositions, and misled the authorities into thinking the designs were trade secrets.

The privilege conferred by section 47(2) in defamation actions is absolute and unaffected by the presence of malice. *Albertson v. Raboff*, 46 Cal.2d375, 295 P.2d 405 (1956); *Brody v. Montalbano*, 87 Cal.App.3d 725, 151 Cal.Rptr. 206 (1978), *cert. denied*, 444 U.S. 844, 100 S.Ct. 87, 62 L.Ed.2d 57 (1979); *Pettitt*

v. Levy, 28 Cal.App.3d 484, 104 Cal.Rptr. 650 (1972).[6] Underlying the privilege is the policy of encouraging freedom of communication between citizens and public authorities charged with investigating wrongdoing. *Brody v. Montalbano*, 87 Cal.App.3d 725, 151 Cal.Rptr. 206 (1978); *Imig v. Ferrar*, 70 Cal.App.3d 48, 138 Cal.Rptr. 540 (1977). Accordingly, the privilege applies to communications designed to prompt officials to initiate proceedings as well as to communications made during the course of proceedings. *Brody v. Montalbano*, 87 Cal.App3d 725, 151 Cal.Rptr. 206 (1978). Although by its terms the section 47(2) privilege applies only to defamation actions, California courts have invoked the policies underlying the privilege to defeat liability for interference with business relations and related torts. *Id.* at 738, 151 Cal.Rptr. at 215; *Scott v. McDonnell Douglas Corp.*, 37 Cal.App.3d 277, 292-93, 112 Cal.Rptr. 609, 619-20 (1974); *Bledsoe v. Watson*, 30 Cal.App.3d 105, 109-110, 106 Cal.Rptr. 197, 199-200 (1973).

Forro contends that the courts in *Brody*, *Scott*, and *Bledsoe* provided immunity under the rubric of the doctrine of justification, and only by analogy to the section 47(2) privilege. Forro asserts that the "justification defense" is not absolute and that it presents a question of fact to be decided on a case-by-case basis. It defends the instruction to the jury that it must balance the utility of the defendant's conduct against the hardship it causes and contends that there was evidence from which the jury could decide in Forro's favor.

It is true that the California courts have spoken in terms of "justification" rather than "privilege" when discussing why communications with officials may not serve as the basis of liability on a claim of intentional interference with a contractual relationship.

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[6] In the intentional tort context, a privilege may be either "absolute" or "qualified." Conduct that is absolutely privileged may not be a predicate for liability regardless of the motive or purpose of the actor. A qualified privilege, however, in general only protects the actor where he can show that he acted reasonably and with proper motive. *See* W. Prosser, *Law of Torts* § 16 at 98-99 (4th ed. 1971).

However, the California court's use of the term "justification" appears to be synonymous with "privilege"—i.e., certain kinds of conduct are justified as a matter of law, *H & M Assoc. v. City of El Centro,* 109 Cal.App.3d 399, 405-09, 167 Cal.Rptr. 392, 396-99 (1980); *Lowell v. Mother's Cake & Cookie Co.,* 79 Cal.App.3d 13, 17-22, 144 Cal.Rptr. 664, 667-70 (1978); *A. F. Arnold & Co. v. Pacific Professional Ins.,* 27 Cal.App.3d 710, 713-16, 104 Cal.Rptr. 96, 98-100 (1972). The *Brody, Scott,* and *Bledsoe* courts apparently considered communications with authorities to be justified under all circumstances.[7]

Forro asserts alternatively that although privilege may exist for properly motivated communications, privilege does not provide a shield if the challenged communications are not intended to achieve the objectives of the official proceeding. *See Bradley v. Hartford Accident & Indem. Co.,* 30 Cal.App.3d 818, 106 Cal.Rptr. 718 (1973).[8] *See also Royer v. Steinberg,* 90 Cal.App.3d 490, 153 Cal.Rptr. 499 (1979); *Frisk v. Merrihew,* 42 Cal.App.3d 319, 116 Cal.Rptr. 781 (1974). Forro argues that IBM cannot claim privilege because its objective was to harm Forro and others by creating a "thunderclap" of publicity, rather than to report wrongdoing.

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[7] The courts in *Bledsoe* and *Scott* sustained demurrers to the complaint and the court in *Brody* upheld a directed verdict for defendant. The practical effect of this application of the justification defense is to accord immunity coextensive with and indistinguishable from the absolute privilege provided by section 47(2).

[8] In *Bradley,* the plaintiff based a defamation claim on allegedly libelous statements contained in documents filed in a personal injury action. The trial court found the statements to be absolutely privileged under section 47(2) and dismissed the claim. The California Court of Appeal reversed, finding that the documents had been filed for the sole purpose of having the defamations republished by the news media. Because the publication was not made to achieve the objects of the litigation and promote the interests of justice, the court refused to afford the slanderer the protection of the statutory privilege. 30 Cal.App.3d at 826, 106 Cal.Rptr. at 723-24.

Forro points to the jury's rejection of IBM's justification defense as an indication that IBM's motives were improper. The absolute privilege is not defeated, however, by the communicant's ulterior motives, *Scott v. McDonnell Douglas Corp.*, 37 Cal.App.3d 287, 112 Cal.Rptr. 60 (1974). There is ample support in the record for IBM's position that the company's communications to the authorities were made for law enforcement purposes as well as for the purpose of creating publicity.[9] Indeed the jury verdict for IBM on its claim for misappropriation of trade secrets could be read to indicate a view on the part of the jury that the communications to the authorities had in part a legitimate purpose. A California court would resolve any doubts in favor of a finding of privilege. *Twyford v. Twyford,* 63 Cal.App.3d 916, 134 Cal.Rptr. 145 (1976). We conclude that all of IBM's communications to the authorities were privileged.

Accordingly, we find that the trial court erred in failing to instruct the jury that IBM's communications with the authorities and its participation in the search were privileged under California law. The evidence relating to these activities was such a major part of the proof adduced by Forro in support of its claim of intentional interference that its admission at all and certainly its admission without proper instruction was prejudicial to IBM's cause.

Accordingly, we reverse and remand for a new trial on this count.

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[9] IBM explains that its expressed aim to create a "thunderclap" of publicity reflected the hope of some IBM security officials that the publicity attending criminal prosecutions would have a deterrent effect on trafficking in its trade secrets. Forro, on the other hand, says the desired effect was to discredit Forro in the eyes of its customers.

III

MISAPPROPRIATION OF TRADE SECRETS

The jury awarded $260,777 to IBM on its claim of misappropriation of trade secrets. Forro challenges both the sufficiency and the admissibility of the evidence supporting the claim.

A. Sufficiency of the Evidence

The trial judge instructed the jury that IBM must prove

> (1) the drawings allegedly used by Forro constituted trade secret information and were so treated by IBM;
>
> (2) Forro improperly came into possession of the secret information;
>
> (3) Forro used the trade secret information in the conduct of its business; and
>
> (4) as a proximate result of this use Forro was unjustly enriched.

With regard to the first element of proof, Forro contends IBM's evidence was insufficient because it never specified beyond vague references to "dimensions and tolerances" exactly what trade secrets were misappropriated. Forro argues further that IBM was obligated to make direct comparisons between IBM and Forro drawings, and that such a juxtaposition would show that there had been no misappropriation. Forro also questions the sufficiency of the evidence to establish the second element, proof that Forro had improperly come into possession of the secrets.

We find that IBM introduced sufficient evidence to allow the jury to identify the secrets claimed to be misappropriated. The definition of "trade secret" is broad:

> It is now settled that a trade secret may consist of any formula, pattern, device or compilation of information which is used in one's business, and which gives him an opportunity to obtain an advantage over competitors who do not know or use it. It may be a formula for chemical compound, a process

> of manufacturing, treating or preserving materials, a pattern for a machine or other device or list of customers . . . .

Sinclair v. Aquarius Electronics, Inc., 42 Cal.App.3d 216, 116 Cal.Rptr. 654, 658 (1974) (emphasis omitted). IBM introduced a wealth of evidence to the effect that Forro came into possession of compilations of information concerning the Merlin and Winchester devices in the form of engineering drawings and blueprints. We do not think that IBM's burden of proof required a direct comparison of Forro's drawings with IBM's. We think the evidence was sufficient to permit the inference that Forro improperly acquired what it knew to be IBM's proprietary information. There was ample testimony about the acquisition of Merlin drawings through Shinn of Sigma Technology. The fact that Forro offered Merlin parts before the date of IBM's first shipment to customers suggests that the specifications used by Forro were IBM's work product rather than information acquired through reverse engineering. Damm testified that Fowler solicited and acquired Winchester information. The similarity of one of Forro's Winchester-compatible parts to the European-made version of the part corroborated IBM's assertion that the specifications were acquired through Damm, as opposed to Forro's assertion that it reverse engineered the part from a United States-made part it had lawfully acquired. If Forro copied the European version of the part, it used confidential information, because its drawing was dated prior to the time it could have first acquired the European part legally. Furthermore, although the drawings hidden by Fowler and his son on the day of the search were never identified at trial, the jury could have inferred from the activity that Fowler and his son were concealing secret IBM information.

B Admissibility of Certain Evidence

We likewise reject Forro's contentions that the trial court improperly admitted certain evidence. The trial court admitted hearsay evidence relating to IBM's trade secrets investigation and the ensuing arrests, indictments, and convictions, for the limited purpose of showing IBM's state of mind when it requested help from the San Jose Police. Forro contends that the probative value

of the evidence was substantially outweighed by its prejudicial effect and that the jury inferred from the evidence that Forro must have been implicated in the theft of trade secrets. Fed.R.Evid. 403.

The trial court's ruling in this regard was within its discretion, 22 C. Wright & K. Graham, *Federal Practice and Procedure*, § 5212 at 250-58 (1978), and we cannot say that it abused its discretion. The evidence was central to IBM's defense to the intentional interference and antitrust claims. In view of the limiting instruction given by the judge that the evidence be used only to show IBM's state of mind, we cannot say that its prejudicial effect "substantially outweighed" its probative value.

Forro's remaining assertions of error relate to matters peculiarly within the trial court's discretion. We find them without merit. Forro claims that the trial judge erred in allowing IBM witnesses Anderson and Finck to testify even though they were not identified until after the trial commenced; in determining that circumstances did not warrant an instruction that an adverse inference could be drawn from the production of weak evidence when strong evidence was available; and in refusing to admit into evidence marginally relevant exhibits concerning correspondence between IBM and another vendor. We disagree.

We accordingly affirm the judgment in favor of IBM on its claim of misappropriation of trade secrets.

IV

SHERMAN ACT SECTION 2 CLAIMS

After the jury had deadlocked on Forro's antitrust claims, IBM moved for entry of judgment under Fed.R.Civ.P. 50(b), which provides that "[i]f no verdict was returned the court may direct the entry of judgment as if the requested verdict had been directed or may order a new trial." The trial court in deciding whether to grant the motion should view conflicting evidence in the light most favorable to the non-movant, and determine whether the proffered result is the only reasonable conclusion. 5A *Moore's Federal Practice* ¶ 50.07[2] (2d ed. 1980). Our review is

controlled by the same standard. In making our review, we must accept as true facts that necessarily were established by the jury's verdicts in favor of Forro on the intentional interference claim and in favor of IBM on the misappropriation claim.

We address first IBM's arguments that there was a failure of proof on essential elements of the monopolization and attempted monopolization claims. We conclude that IBM was entitled to judgment on the monopolization claim because Forro failed to introduce sufficient evidence to establish IBM's market power. We further agree with the district court that the evidence was insufficient to present an issue for the jury on the attempted monopolization claim. Finally, we hold that IBM's invocation of police assistance, which resulted in an investigation and a search of Forro's plant, may not serve as the basis of an antitrust claim because these actions are accorded immunity.

A. Section 2 Monopolization Claim

Generally speaking, a plaintiff claiming a violation of the Sherman Act's proscription of monopolization must establish three things:

(1) possession of monopoly power in the relevant market;

(2) willful acquisition or maintenance of that power; and

(3) causal "antitrust" injury.

California Computer Prods. v. International Business Machines Corp., 613 F.2d 727, 735 (9th Cir. 1979). IBM contends that Forro did not introduce evidence sufficient to support a finding that IBM possessed monopoly power. IBM points out that Forro's proof on this element consisted solely of two items of evidence:

(1) a stipulation that IBM's share of the domestic electronic data processing market was 30-35% and that its share was declining in the early 1970's; and

(2) a partial listing of United States-based electronic data processing firms and their revenues.

IBM further notes that Forro produced no expert testimony to interpret either piece of evidence.

IBM asserts that a 35% market share is inadequate as a matter of law to support an inference of monopoly power. We find that Forro has not introduced sufficient evidence to allow a jury to infer that IBM possessed market power. In the absence of further information about the market, a 35% market share, and particularly a declining 35% market share, provides little or no support to a claim of market power. *See Hunt-Wesson Foods, Inc. v. Ragu Foods, Inc.*, 627 F.2d 919, 924-25 (9th Cir. 1980), *cert. denied*, 450 U.S. 921, 101 S.Ct. 1369, 67 L.Ed.2d 348 (1981). Forro would have us infer from the list of competitors that market power existed because IBM, despite its low market share, was large in relation to each of its individual competitors. Without the benefit of expert testimony or other credible evidence to support an inference of market power from the list of companies and the market share, any such inference would be sheer speculation. We find that a reasonable person could not have justifiably inferred the existence of monopoly power from the evidence Forro submitted.

B. Section 2 Attempted Monopolization Claim

The trial court granted judgment against Forro not only on the monopolization claim but on its attempt-to-monopolize claim.

Specific intent and anticompetitive conduct are essential elements of a claim of attempted monopolization. *See, e.g., Greyhound Computer Corp. v. International Business Machines Corp.*, 559 F.2d 488, 504 (9th Cir. 1977), *cert. denied*, 434 U.S. 1040, 98 S.Ct. 782, 54 L.Ed.2d 790 (1978); *Blair Foods, Inc. v. Ranchers Cotton Oil*, 610 F.2d 665, 669 (9th Cir. 1980). Specific intent may, of course, be proved by direct evidence but is more usually proved by inference from anticompetitive conduct. *California Computer Prods. v. International Business Machines Corp.*, 613 F.2d 727, 736-37 (9th Cir. 1979).

This circuit has rejected the premise that probability of actual monopolization is an essential element of proof of attempt to

monopolize. Specific intent to monopolize is sufficient and that intent may be inferred from conduct. *Lessig v. Tidewater Oil Co.*, 327 F.2d 459, 474 (9th Cir. 1964). But, where as here there is not proof of market power, the conduct to support an inference of specific intent to monopolize, should be of a kind clearly threatening to competition or clearly exclusionary. *Janich Bros., Inc. v. American Distilling Co.*, 570 F.2d 848, 854 n.4 (9th Cir. 1977), *cert. denied*, 439 U.S. 829, 99 S.Ct. 103, 58 L.Ed.2d 122 (1978).

Forro's proof of intent was based wholly on inference from IBM's conduct and its effects. To support the inference of anticompetitive intent, Forro relied heavily on IBM's conduct in approaching the San Jose Police Department and participating in the search of Forro. IBM argues that it is immune from antitrust liability for this conduct under the *Noerr-Pennington* doctrine. *See United Mine Workers v. Pennington*, 381 U.S. 657, 85 S.Ct. 1585, 14 L.Ed.2d 626 (1965); *Eastern R.R. Presidents Conference v. Noerr Motor Freight, Inc.*, 365 U.S. 127, 81 S.Ct. 523, 5 L.Ed.2d 464 (1961).

The *Noerr-Pennington* doctrine immunizes from the antitrust laws anticompetitive conduct undertaken to influence or petition government bodies, or to utilize judicial or quasi-judicial mechanisms. The grant of immunity promotes two policies: (1) protection of the political process, because decision-making bodies rely on private parties to come forth with information; and (2) protection of the individual's right to petition government. *Noerr*, 365 U.S. at 137-38, 81 S.Ct. at 529-30. *See generally, Subscription Television, Inc. v. Southern California Theatre Owners Ass'n*, 576 F.2d. 230 (9th Cir. 1978). This doctrine was applied in *Noerr* to a publicity campaign aimed at passage and enforcement of state laws, and in *Pennington* to efforts to secure favorable action from executive-branch officials. Immunity has since been granted to "the approach of citizens . . . to administrative agencies . . . and to courts." *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 510, 92 S.Ct. 609, 611, 30 L.Ed.2d 642 (1972). *See also Franchise Realty Interstate Corp. v. San Francisco Local Joint Executive Board of Culinary Workers*, 542 F.2d

1076 (9th Cir. 1976).[10] The one case we have discovered that specifically found the doctrine applicable to a citizen's approach to a law enforcement agency is *Harman v. Valley National Bank of Arizona*, 339 F.2d 564 (9th Cir. 1964), wherein the attorney general of Arizona was induced to file an action that resulted in placing the Arizona Savings and Loan Association in receivership and closing its business. The court's rationale was that the citizen's conduct in informing the attorney general of alleged "irregularities" and persuading him to take enforcement action was essentially political in nature. *Id.* at 566. We do not liken an approach to the police for aid in apprehending wrongdoers to political activity. However, we think that the public policies served by ensuring the free flow of information to the police, although somewhat different from those served by *Noerr-Pennington*, are equally strong. Encouraging citizen communication with police does not generally promote the free exchange of ideas, nor does it provide citizens with the opportunity to influence policy decisions. *Compare Noerr*, 365 U.S. at 137-38, 81 S.Ct. at 529-30. Nonetheless, it would be difficult indeed for law enforcement authorities to discharge their duties if citizens were in any way discouraged from providing information. We therefore hold that the *Noerr-Pennington* doctrine applies to citizen communications with police.

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[10] Other courts have reasoned that the scope of immunity depends on the degree of political discretion exercised by the government agency. *Hecht v. Pro-Football, Inc.*, 444 F.2d 931, 941-42 (D.C.Cir. 1971), *cert. denied*, 404 U.S. 1047, 92 S.Ct. 701, 30 L.Ed.2d 736 (1972); *Woods Exploration & Producing Co. v. Aluminum Co. of America*, 438 F.2d 1286, 1296-98 (5th Cir. 1971), *cert. denied*, 404 U.S. 1047, 92 S.Ct. 701, 30 L.Ed.2d 736 (1972). We agree that claimed abuses of government processes should receive more intense scrutiny outside the area of legislative activity. *See also Rodgers v. FTC*, 492 F.2d 228, 232 n.3 (9th Cir. 1974) (dictum); *Israel v. Baxter Laboratories, Inc.*, 466 F.2d 272, 275-80 (D.C.Cir.1972); *Semke v. Enid Automobile Dealers Ass'n*, 456 F.2d 1361, 1366-67 (10th Cir. 1972); *Outboard Marine Corp. v. Pezetel*, 474 F.Supp. 168, 176-78 (D.Del.1979); *Marketing Assistance Plan, Inc. v. Associated Milk Producers, Inc.*, 338 F.Supp. 1019, 1023-24 (S.D.Tex.1972); 1 P. Areeda & D. Turner, *Antitrust Law* 204 (1978).

Forro argues that, even if communications with police are generally immunized, IBM's conduct falls within the "sham exception" first articulated in *Noerr*. The Court in that case suggested that anti-competitive conduct "ostensibly directed toward influencing governmental action, [which] is a mere sham to cover what is actually nothing more than an attempt to interfere directly with the business relationships of a competitor," is not immune. 865 U.S. at 144, 81 S.Ct. at 533. In *Noerr*, the Court held that even deliberately deceptive advertising aimed at influencing legislative decisions was immune from the antitrust laws. However, the Court applied the exception in *California Motor Transport Co. v. Trucking Unlimited*, 404 U.S. 508, 92 S.Ct. 609, 30 L.Ed.2d 642 (1972), and allowed an antitrust claim to be based on repetitive filing of baseless petitions before a state agency. The Court found that conduct to be an attempt to clog the agency's decision-making process and to deprive the competitor of an opportunity to have its applications considered. *See also Otter Tail Power Co. v. United States*, 410 U.S. 366, 93 S.Ct. 1022, 35 L.Ed.2d 359 (1973) (sham exception applicable to filing of baseless lawsuits for anti-competitive purposes).

The sham exception permits the imposition of antitrust liability on those seeking action from government agencies only when the activity in question can serve no useful purpose, and is undertaken for purely anti-competitive reasons. If, in the case before us, IBM had provided the police with deliberately false information, solely for the purpose of harassing Forro or of achieving other ends unrelated to law enforcement, its conduct would unquestionably come within the sham exception.

However, even when the evidence is viewed most favorably toward Forro, we cannot say that the evidence would support a finding that IBM's request for help from the San Jose Police Department in catching those who were stealing its trade secrets was a sham. The evidence may support an inference that IBM had the intent to harass the PCM's and their vendors, but Forro had to show as well that IBM had no legitimate purpose in going to the police or that it used the police in an illegitimate manner. The jury's verdict for IBM on its claim of misappropriation of its

trade secrets indicates that IBM had cause to seek help from the police,[11] and our review of the record supports that finding. All that can be inferred from the jury's verdict in favor of Forro on its claim of intentional interference is that IBM intentionally interfered with Forro's relationship with its customer.[12] This would be consistent with a finding of anticompetitive intent, but it sheds no

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[11] The trial court's general instruction on the misappropriation claim was as follows:

Instruction Number 44

The defendant makes a counterclaim for damages against the plaintiff, claiming that the plaintiff misappropriated trade secret information that belonged to the defendant.

To prevail on such a claim against the plaintiff, the defendant must establish, by a preponderance of the evidence in the case, each of the following essential elements:

FIRST: That the information involved constituted trade secret information, and was so treated by the defendant;

SECOND: That the plaintiff improperly came into possession of defendant's trade secret information;

THIRD: That plaintiff used the trade secret information in the conduct of its business; and

FOURTH: That as a proximate result of plaintiff's use of defendant's trade secret information, plaintiff was unjustly enriched.

[12] The trial court's instructions on the intentional interference claim are in relevant part as follows:

Instruction Number 37

Plaintiff also makes a claim that the defendant IBM intentionally interfered with the plaintiff's prospective business advantages.

To prevail on this claim, the plaintiff must prove, by a preponderance of the evidence in the case, each of the following essential elements:

FIRST: That an economic relationship existed between the plaintiff and its customers, containing the probability of future economic benefit to the plaintiff;

SECOND: That the defendant knew of the existence of the relationship;

THIRD: That there were intentional acts on the part of the defendant designed to disrupt the relationship;

light on whether IBM had a valid purpose in seeking police assistance.

The facts the jury necessarily found in rejecting IBM's justification defense to the interference claim must be viewed in context. The court instructed the jury to balance the harm caused to Forro by the interference with its ongoing business relationships with its customers against the conduct of IBM in protecting its trade secrets and aiding the police in law enforcement.[13] The most that can be said is that the jury found that on balance, IBM's interference with Forro was excessive under the circumstances.[14] The *Noerr-Pennington* doctrine requires a very different analysis. If IBM in good faith asked the police to perform a valid police function, IBM's conduct is immune from antitrust liability notwithstanding the fact the IBM also had anticompetitive intent. We are unwilling to infer from the jury's rejection of the justification defense that it found IBM's solicitation of police assistance to be a sham.

FOURTH: That there was an actual disruption of the relationship; and

FIFTH; That the defendant's acts proximately resulted in damage to the plaintiff's business.

* * * * * *

Instruction Number 40

The third element of a claim of intentional interference with prospective business advantage is that the defendant had the specific intent to disrupt the economic relationship. That is, you must find that, with knowledge of the plaintiff's economic relationships, the defendant took specific action which was taken for the purpose of harming those relationships.

It is not sufficient, in order to establish specific intent, for you to find that the defendant had knowledge of the relationship, and that the defendant took an act which had some effect upon that relationship. Instead, you must find that the act or action was so taken with the intent of adversely affecting the plaintiff's economic relationship.

[13] *See* note 3, *supra*.

[14] *See* note 4, *supra*.

We conclude that Forro's antitrust claim may not be based on IBM's solicitation of aid from the San Jose Police Department that resulted in the police investigation and search of Forro's premises, or on IBM's assistance in these activities.

Forro's other evidence is insufficient to support the attempted monopolization claim. Forro showed at most that IBM's actions harmed Forro, a vendor with whom IBM does not directly compete. There was no demonstrated effect on competition generally, at either of two levels, *i.e.,* among PCM's or among vendors to the PCM's. IBM argues the Forro was just one among many suppliers to PCM's and that entry barriers for the PCM vendor industry were low. It asserts that its conduct aimed at halting industrial theft had none of the usual components of the type of economic restraints that could give rise to inferences of specific anticompetitive intent. Under these circumstances, IBM argues the inference of specific intent to monopolize the worldwide market for electronic data-processing products and services (the market to which the parties stipulated) is simply implausible. The district court dismissed the attempt claim on the basis that Forro failed to present substantial evidence to make out a *prima facie* case of attempted monopolization. We agree.

We conclude that the trial court properly granted judgment to IBM on Forro's monopolization and attempted monopolization claims.

The case is AFFIRMED in part, REVERSED in part, and REMANDED for proceedings consistent with this opinion.

Appendix B

United States District Court

Northern District of Calirornia

MDL NO. 163-RM

Civil No. C-74-1653-RM

(N.D. Calif)

In re IBM Peripheral EDP Devices Antitrust Litigation

Forro Precision, Inc.,

Plaintiff,

vs.

International Business Machines Corporation,

Defendant.

[Filed July 11, 1983]

ORDER GRANTING SUMMARY JUDGMENT

IBM's Motion for Summary Judgment having come on before the Honorable Ray McNichols, sitting by designation as United States District Judge for the Northern District of California, on June 10, 1983, plaintiff Forro Precision, Inc. appearing by Joseph M. Alioto, Alioto & Alioto, and defendant International Business Machines Corporation appearing by Henry C. Thumann, James V. Selna, and Robert E. Willett, O'Melveny & Myers, and the Court having considered IBM's moving and reply papers, Forro's memorandum in opposition, and the oral arguments of the parties;

IT IS HEREBY ORDERED:

1. Based upon the record in this proceeding, there is no material issue of fact:

(a) That Forro's damage claim consists entirely of an evidentiary showing that Forro suffered damage as a result of the occurrence of a 1973 police search of Forro's premises and IBM's participation in that search. In responding to

IBM's Motion for Summary Judgment, Forro has made no claim or showing of any other damage;

(b) That apart from the evidence of IBM's communications with law enforcement authorities and IBM's participation in the police search, there is no evidence of IBM conduct which as a matter of law is sufficient to constitute proximate cause for the occurrence of the 1973 police search of Forro's premises. In responding to IBM's Motion for Summary Judgment, Forro has made no showing of any IBM conduct beyond that presented in the prior trial record.

2. Under the holding of the Ninth Circuit in this case, IBM's communications with law enforcement authorities and IBM's participation in the 1973 police search are privileged as a matter of law and cannot serve as a basis for imposing liability on IBM.

3. IBM is entitled to judgment as a matter of law, and its Motion for Summary Judgment dismissing Forro's remaining claim for intentional interference with prospective advantage (Count VII of the First Amended Complaint) is hereby granted.

DATED: July 7, 1983

/s/ Ray McNichols
United States District Judge

United States District Court

Northern District of California

MDL No. 163-RM

Civil No. C74-1653-RM

(N.D. Calif)

In re IBM Peripheral EDP Devices Antitrust Litigation

Forro Precision, Inc.,

Plaintiff,

vs.

International Business Machines Corporation,

Defendant.

[Filed July 11, 1983]

JUDGMENT

The United States Court of Appeals for the Ninth Circuit having remanded plaintiff's common-law claim for further proceedings, said claim being the only remaining claim in this action, defendant International Business Machines Corporation having moved for summary judgment on said claim, and the Court having granted said motion on June 10, 1983;

It Is Hereby Ordered, Adjudged, and Decreed:

1. That plaintiff Forro Precision Inc. recover nothing from defendant International Business Machines Corporation on its remaining common-law claim for intentional interference with prospective advantage (Count VII), and that defendant International Business Machines Corporation have judgment in its favor in said claim.

2. That defendant International Business Machines Corporation recover its costs of suit herein.

DATED: July 7, 1983

/s/ Ray McNichols
United States District Judge

Appendix C

THE UNITED STATES COURT OF APPEALS
FOR THE NINTH CIRCUIT

DC No. CV-74-1653-RM

CA No. 83-2243

FORRO PRECISION, INC.,
Plaintiff-Appellant,

v.

INTERNATIONAL BUSINESS
MACHINES CORPORATION,
Defendant-Appellee.

OPINION

[Filed Oct. 26, 1984]

Appeal from the United States District Court
for the Northern District of California
Honorable Ray McNichols, J., Presiding

Argued and Submitted: August 7, 1984

Decided: 10-26-84

Before: TANG, POOLE, and CANBY, Circuit Judges

POOLE, Circuit Judge:

This case has been before this court once before. *Forro Precision, Inc. v. Intern. Business Machines,* 673 F.2d 1045 (9th Cir. 1982) (hereinafter "*Forro I*"). Following our order remanding this case for a new trial, the district court granted summary judgment for defendant, and plaintiff Forro appealed. We affirm.

I. *Facts.*

The events underlying this case were fully described in *Forro I*, and need not be recounted here at length.

Forro Precision, Inc. (Forro) brought this action against International Business Machines Corporation (IBM) as a result of IBM's role in a highly-publicized, 12-hour police search of Forro's business premises. The search by Santa Clara police officers in 1973 resulted from IBM's request for police assistance

in the company's efforts to locate the source of confidential IBM engineering documents that might have found their way into the hands of IBM competitors. Forro's lawsuit alleged that IBM orchestrated the search of its premises in order to create a "thunderclap" of adverse publicity, and that it thereby tortiously interferred with Forro's contractual relations.

A jury found for Forro on its claim of intentional interference with contract, and awarded $2,739,010 in damages.

On appeal, we reversed, holding that IBM's communications with authorities were absolutely privileged under California Civil Code §47(2).[1] *Forro* I, p. 1055. We remanded the case for a new trial stating:

> Accordingly, we find that the trial court erred in failing to instruct the jury that IBM's communications with the authorities and its participation in the search were privileged under California law. The evidence relating to these activities was such a major part of the proof adduced by Forro in support of its claim of intentional interference that its admission at all and certainly its admission without proper instruction was prejudicial to IBM's cause.

Forro I, p. 1056. On remand, IBM moved for summary judgment. The district court concluded that apart from evidence of conduct held privileged by our opinion, "there is no case," and granted the summary judgment motion.

II. *Discussion.*

Our standard of reviews on summary judgment focuses on the same issue which was before the district court: whether, viewing all factual issues in the light most favorable to the non-moving party, Forro, there existed no genuine issue of material fact upon which IBM could have been found liable for intentional interference with Forro's contractual relations. Since our prior opinion

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[1] California Civil Code §47(2) states in relevant part: "A privileged publication or broadcast is one made * * * 2. In any (1) legislative or (2) judicial proceeding, or (3) in any other official proceeding authorized by law * * * . . " California courts have held that the privilege applies to communications made to prompt law enforcement officials to initiate proceedings. *Brody v. Montalbano*, 87 Cal.App.3d 725 (1978), *cert. denied*, 444 U.S. 844 (1979).

held that IBM's communications with police officials and its instigation and cooperation in the search of Forro's premises were absolutely privileged, the single issue here is whether IBM's non-privileged conduct could support a finding of liability. We agree with the district court that it could not.[2]

A. *Fraudulent silence.* Forro argues that the privilege of California Civil Code § 47(2) extends only to affirmative disclosures and not to selective failures to disclose information. We disagree. Forro alleged, and for purposes of summary judgment we may accept, that IBM deliberately withheld from the Santa Clara police information which, if revealed, might have dissuaded them from searching Forro's premises. Forro argues, in particular, that the police would not have authorized the search had they known that, more than a year earlier during discovery for another lawsuit, IBM had already obtained from Forro the allegedly secret IBM documents in Forro's possession and had voluntarily returned them to Forro without restrictions.

Forro's "fraudulent silence" doctrine, however, is incompatible with the § 47(2) privilege and with our prior opinion. In *Forro* I, we explicitly noted that IBM's alleged deception was accomplished by its failure to present certain information to police

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[2] Forro's reliance on *Gruenberg v. Aetna Insurance Company*, 9 Cal.3d 566 (1973) is misplaced. In *Gruenberg*, the cause of action against the insurance company "transcended" the privileged acts because those acts were separate and independent of the essential wrongful conduct alleged: unjustified failure to pay amounts owed under the contract of insurance. Here, by contrast, all Forro's injury arose directly from the police search, for which we have held IBM protected by the Civil Code § 47(2) privilege. [In *Gruenberg*, an insurance company encouraged arson charges against its insured, then denied liability on its policy when the insured refused to give a statement concerning the fire while arson charges were still pending. Though statements made by company officials to fire department arson investigators were protected by the Civil Code § 47(2) privilege, the California Supreme Court reversed a judgment dismissing an action against the insurance company. The court stated that "even if * * * privileges apply to the separate acts of the insurer's alleged agents, the defendant insurers may not benefit from them because their alleged scheme to avoid liability under the policies, in breach of an implied duty of good faith and fair dealing, transcends the individual acts of their agents." 9 Cal.3d at 576, n.5.]

officials. 673 F.2d at 1055. Nevertheless, we made no exception from the privilege for such deception by inaction.

Nor could we logically make such an exception. We see no reason why the absolute privilege of § 47(2) should protect the speaker who baldly and maliciously lies to the authorities, yet exclude one who speaks a half-truth. Whatever the policy justifying § 47(2), it could not be advanced by such a fine distinction. Accepting Forro's argument would tend to undermine and destroy the § 47(2) privilege, contrary to California's manifest policy of resolving doubts in favor of extending that privilege. *Twyford v. Twyford*, 63 Cal.App.3d 916 (1976).

B. *Non-Privileged Conduct.* Forro failed to show any proximate causal connection between its injury and any non-privileged conduct by IBM.

Forro points to "Operation Artichoke," an IBM industrial espionage project. In "Operation Artichoke," IBM paid agents to attempt surreptitiously to purchase plans for IBM's own "Winchester" disk drive, in hopes of finding the ultimate source of the documents in IBM. But "Operation Artichoke" discovered no connection between Forro and the theft of the "Winchester" plans; regardless whether the project was otherwise objectionable, it caused no harm to Forro. The only possible connection between "Operation Artichoke" and Forro's injury is through the police search, which we have already held to be privileged.

IBM's return of documents to Forro following depositions in an earlier action had no effect on Forro except through the police search. This conduct does not form an independent ground for liability. Similarly, there was no showing that IBM's alleged agreements with Honeywell, 3M and Control Data Corporation for their cooperation in the "thunderclap" of publicity were connected with Forro's injury except through the police search. Neither forms an independent ground for liability.

Forro argues for the first time on appeal that, following the search, IBM inflamed publicity against Forro and that IBM officials visited a Forro customer, Nashua, to dissuade it from doing business with Forro. However, since this argument was never made to the district court, we need not consider it. *Inland Cities Express v. Diamond Nat. Corp.*, 524 F.2d 753, 755 (9th Cir. 1975).

Moreover, even if it were properly before us, this argument would not support Forro's case. The most egregious IBM-generated publicity cited by Forro was an article in which an IBM spokesman stated that IBM had "cooperated with the police" and that the company was "saddened" by the possibility that IBM personnel might be linked with theft of trade secrets. The statement was not directed specifically at Forro, and it is inconceivable that it caused Forro any injury. As for the alleged visit to Forro customer Nashua, it is undisputed that Nashua had decided to reduce its existing requirements contract with Forro *before* the post-search visit by IBM officials. There is no causal link between these events and injury to Forro.

III. *Conclusion.*

The district court correctly concluded that there was no triable issue of material fact. Our prior opinion held that IBM could not by held liable for its participation in the search of Forro's facilities, and there was no showing of any other, non-privileged basis of liability. The summary judgment for IBM is AFFIRMED.

Appendix D

THE CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Fourth Amendment to the Constitution of the United States provides:

> "The right of the people to be secure in their persons, houses, papers, and effects, against unreasonable searches and seizures, shall not be violated, and no Warrants shall issue, but upon probable cause, supported by Oath or affirmation, and particularly describing the place to be searched, and the persons or things to be seized."

2. Article 1, Section 13 of the Constitution of the State of California provides:

> "The right of the people to be secure in their persons, houses, papers, and effects against unreasonable seizures and searches may not be violated; and a warrant may not issue except on probable cause, supported by oath or affirmation, particularly describing the place to be searched and the persons and things to be seized."

3. The Seventh Amendment to the Constitution of the United States Constitution provides:

> "In Suits of common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise reexamined in any Court of the United States, than according to the rules of the common law."

4. Article 1, Section 16 of the Constitution of the State of California provides in pertinent part:

> "Trial by jury is an inviolate right and shall be secured to all."

5. California Civil Code Section 43.5(a) provides:

> "There shall be no liability on the part of and no cause of action shall arise against any peace officer who makes an arrest pursuant to a warrant of arrest regular upon its face if such peace officer in making the arrest acts without malice

and in the reasonable belief that the person arrested is the one referred to in the warrant."

6. California Code of Civil Procedure Section 262.1 provides:

"A sheriff or other ministerial officer is justified in the execution of, and shall execute, all process and orders regular on their face and issued by competent authority, whatever may be the defect in the proceedings upon which they were issued."

7. California Penal Code Section 1530 provides:

"A search warrant may in all cases be served by any of the officers mentioned in its directions, but by no other person, except in aid of the officer on his requiring it, he being present and acting in its execution."

8. California Penal Code Section 830.6(b) provides:

"Whenever any person is summoned to the aid of any uniformed peace officer, such person shall be vested with such powers of a peace officer as are expressly delegated him by the summoning officer or as are otherwise reasonably necessary to properly assist such officer."

9. California Civil Code Section 47(2) provides in pertinent part:

"A privileged publication or broadcast is one made in any (1) legislative or (2) judicial proceeding, or (3) in any other official proceeding authorized by law."

Appendix E

Description of Things to Be Seized

Forro Search Warrant

(1) Blueprints, drawings and specifications for computer components or computer direct access storage devices, bearing the name of International Business Machines (IBM) or any other IBM identifying marks;

(2) Blueprints, drawings, and specifications containing drawings of IBM parts or containing IBM dimensions, IBM tolerance or other IBM data relating to computer components or computer direct access storage devices;

(3) Any business records such as purchase orders, correspondence, memoranda, bid or quotation forms, relating to the purchase, manufacture, or sale of computer components or computer direct access storage devices with IBM compatible dimensions, tolerances or specifications;

(4) Any computer components or computer direct access storage devices or components thereof being manufactured on or marketed from such premises, which devices and components are manufactured from IBM designs, specifications, dimensions, and tolerances.